In the Supreme Court of the United States

October Term, 1925.

Number 665.

The Village of Euclid, Ohio, and Harry W. Stein,
Inspector of Buildings for the Village of Euclid,
Appellants,

vs.

The Ambler Realty Company,
Appellee.

On Appeal from the District Court of the United States
For the Northern District of Ohio.

BRIEF AND ARGUMENT FOR APPELLEE.

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NUMBER 665.

THE VILLAGE OF EUCLID, OHIO, and HARRY W. STEIN, Inspector of Buildings for the Village of Euclid,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF AND ARGUMENT FOR APPELLEE.

The opinion of the District Court in this case is reported in *Ambler Realty Company v. Village of Euclid, et al.*, 297 Fed. 307.

JURISDICTION.

No question was raised as to the jurisdiction of the District Court of the United States in this action and no question is raised here as to the jurisdiction of this court on appeal.

The jurisdiction of the District Court rests upon the fact that the Bill of Complaint charged the invalidity of an ordinance of the Village of Euclid as being in violation of the Fourteenth Amendment to the Constitution of the

United States and the District Court held the ordinance void as being in violation of that amendment.

The decree in the District Court was dated January 31, 1924, (Rec. p. 61.) The petition for appeal was filed March 31, 1924, and allowed April 1, 1924, (Rec. p. 63). The direct appeal to this Court as perfected under Section 238 of the Judicial Code, 36 Stat. L. 1157, the issues presenting

> "a case that involves the construction or application of the Constitution of the United States" and also a case in which a "law of a state is claimed to be in contravention of the Constitution of the United States."

That an ordinance of the Village of Euclid is such a law of the State of Ohio and that this Court has jurisdiction in a direct appeal from the District Court for the Northern District of Ohio is established in *Penn Mutual Life Insurance Company vs. The City of Austin,* 168 U. S. 685, 694; *Home Telephone & Telegraph Co. vs. Los Angeles,* 227 U. S. 278.

THE QUESTION TO BE DECIDED.

The question to be decided is whether Ordinance No. 2812 of the Village of Euclid, an alleged comprehensive zoning ordinance, imposing a variety of restrictions upon the use of lands within the village limits, is or is not a violation of the rights guaranteed to the Ambler Realty Company, an owner of land therein, by the Constitutions of the United States and of the State of Ohio.

It will be necessary hereafter to state more at large the limits of the police power and the applicable constitutional restraints.

STATEMENT OF THE CASE.

The Ambler Realty Company, plaintiff below, is a corporation, organized under the laws of the State of Ohio, for the purpose of owning, holding and dealing in real estate. It owns, in the Village of Euclid, defendant below, about 68 acres of land. The Village of Euclid is a municipal corporation of the State of Ohio, is a suburb of the City of Cleveland and a part of the general metropolitan and industrial district of which the City of Cleveland is the center.

A map of the Village of Euclid is found in the printed record opposite page 26. There was introduced in evidence but not printed, plaintiff's Exhibit B, (Record, 69) which is a recent map of the City of Cleveland and its adjacent suburbs. This shows the whole of the metropolitan district in question, which extends for about nineteen miles along the shore of Lake Erie and southerly therefrom in an irregular semi-circle with a varying radius of eight to ten miles. The Village of Euclid is located in the northeasterly part of such district and would appear to be part of the City of Cleveland if one did not know of the arbitrary division by corporation lines. The territory of said Village is roughly rectangular in shape, three and a half to four miles each way, the northerly boundary being the shore of Lake Erie.

There were also introduced in evidence (Record, 69) plaintiff's Exhibits D to H inclusive, not printed in the Record. These are U. S. Topographical Maps, dated 1903 to 1907, and show the ground elevations of said metropolitan district and incidentally the street layout and other development of the territory as of that time. When these maps are compared with said Exhibit B, the rapid extension of the whole district in the period since 1903-1907 is shown. Such maps show the larger parts of the City of

Cleveland and the Village of Euclid to be located on a flat plane, elevated 30 to 50 feet above the waters of Lake Erie. To the south of said plain the ground surface rises rather sharply to what, in the southern part of the Village and the easterly part of Cleveland and the other suburbs, is known as the "ridge." The land to the south of this rise is comparatively high and in the southeasterly section of the district, in Cleveland Heights and Shaker Heights, is developing as high-class residence property (Record, 138). The Cuyahoga River, with some small laterals, is shown running northerly through said district into Lake Erie.

The City of Cleveland was founded in 1796 upon a small area of land at the mouth of the Cuyahoga River. With the beginning of its large industrial and commercial development, the city expanded to the larger flat plane above described and gradually covered it to the foot of said "ridge," such development being first in the form of a business center with an encircling residence development. The continued industrial and commercial growth caused business to encroach on such residence territory and to break through the same, particularly along the lines of the various railroads, which include The New York Central, The New York, Chicago & St. Louis, commonly known as the Nickel Plate, both running easterly and westerly through the district, and the Pennsylvania, Erie, Baltimore & Ohio, Cleveland, Cincinnati, Chicago & St. Louis and Wheeling & Lake Erie, coming into the district from the south.

The general plan of street development for the district is based on main thoroughfares, centering in the City of Cleveland. Three of these main thoroughfares are known as Lake Shore Boulevard, which runs easterly near the shore of Lake Erie, through the easterly part of the

City of Cleveland, the Village of Bratenahl and then through the Village of Euclid; St. Clair Avenue, located to the south of Lake Shore Boulevard, following much the same course; and Euclid Avenue, which is the next main thoroughfare to the south. The territory tributary to said Lake Shore Boulevard is largely devoted to residence purposes. St. Clair Avenue runs through a very fully developed industrial and business district in the City of Cleveland and in Euclid Village, most of its course, throughout its entire length, being not far from the New York Central Railroad. Euclid Avenue though originally a fine residence street in the City of Cleveland, is now one of its main business arteries. In the cities of Cleveland and East Cleveland just west of the westerly line of the Village of Euclid, this thoroughfare runs through a new and expanding industrial district and the natural development of the territory tributary thereto in the Village of Euclid, particularly on the north side of the said street, would be for business and industrial purposes.

The New York Central and Nickel Plate railroads run through the Village and are both main lines of said systems. A little westerly, in the City of Cleveland, the "belt line" of the New York Central goes off southerly through the southern part of the City of Cleveland.

In the City of Cleveland the streets running generally in a southerly direction from Lake Erie are numbered consecutively from the center of the City. This numbered system is continued into Euclid Village, the westerly boundary of said Village being approximately on the line of East 185th Street. About the year 1910 there were less than ten industrial establishments having railroad connections east of East 105th Street in said district, (Record, 69), only one of which was in Euclid Village. Today such establishments have increased to approximately 175 (Record, 69). In

Euclid Village proper nearly all of the territory between the New York Central and the Nickel Plate tracks is either developed with industrial plants or is being held for that purpose, (Record, 71). South of the Nickel Plate Railroad and almost adjacent to the 68 acres of land owned by the plaintiff is a large automobile plant, (Record, 70), and toward the center of said Village and on the strip averaging 1700 feet wide, (Record 87, 88 and 89) between the Nickel Plate tracks and Euclid Avenue, are various smaller industries (Record, 70). Just across the easterly line of said Village is a large brick plant and several other large industries adjacent to said railroad. (Record, 71.) The section of said metropolitan district most in demand for industrial development is that tributary to the New York Central and Nickel Plate railroads in the easterly part of the City of Cleveland and in Euclid Village. (Record, 72.) The section just westerly of Euclid Village and particularly in the vicinity of East 152nd Street along the New York Central Railroad and the Ivanhoe Road district to the south along the Nickel Plate is where the most extensive industrial development has *lately* taken place. (Record, 72 and 151.)

The location of the particular lands of The Ambler Realty Company described in the bill is shown blocked in red on the zoning map of the Record, opposite Page 26. This particular block of land is one of the most desirable for factory development in the district. (Record, 72.) Said zoning map, as put in evidence, showed the crosshatchings of the zoning districts, in which said 68 acres was included, under the red coloring.

The population of Euclid Village in 1910 was approximately 2,000. (Record, 1.) Its population now is probably between 5,000 and 7,000. (Record, 28.) In addition to the street and transportation systems of the City of Cleveland

and the Village of Euclid being more or less in common, the public water system of the City of Cleveland also serves the Village of Euclid and even territory to the easterly and southerly of the Village of Euclid some of which is located in the adjoining county of Lake. (Record, 82.)

There was introduced in evidence plaintiff's Exhibit A, an aerial photographic map, (Record, 67) of the westerly part of Euclid Village and adjacent parts of Cleveland, and also Exhibit I to Q inclusive, (Record, 84), which are photographic views of much of the territory between Euclid Avenue and the Nickel Plate Railroad in the Village and show the larger part of such strip to be vacant land with frontage upon Euclid Avenue, a main general traffic thoroughfare, and the railroad on the north, from which switches are readily put into the territory for the purpose of serving industrial plants.

On the hearing of the case below, both sides produced real estate experts, who gave their opinions of the *market value* and *demand* for the said 68 acres belonging to appellee and various other vacant lands in the Village, lying between Euclid Avenue and the Nickel Plate Railroad. These witnesses were Kunkle, Ambler and Witzel, testifying for appellee and Greenlund, Laronge and Stein, testifying for appellant.

EVIDENCE OF VALUE AND DAMAGE.

The witness Kunkle testified that said 68 acres as a whole considered unrestricted as to use, had a value of $9,000 per acre (Record, 72), and if restricted to residence use, one-third of such value (Record, 85). The Euclid Avenue frontage of said tract (150 to 200 feet deep) if sold separately from the rest, considered as unrestricted against business, he valued at $150 to $175 per foot front (Record, 85) and if restricted to residence purposes, at $60 per foot front (Record, 85). The frontage along Euclid Avenue of this parcel is about 1800 feet (see description bill, Record, 6, and admissions of answer, Record, 35). The vacant acreage "between Chardon Road and Bell Avenue" (East 219th Street), north of North Street, he valued at $10,000 per acre unrestricted (Record, 73) and if restricted to residence use, at one-third of such value (Record, 85). The vacant lands east of Bliss Road to the east limits of the Village, as shown on the map, between Euclid Avenue and the Nickel Plate he valued, considered as unrestricted property, from $6500 to $3000 per acre (Record, 73), the value being graduated down from Bliss Road easterly; if restricted to residence use, at one-third of such value (Record, 85). The Euclid Avenue frontage on the northerly side of the street from Bliss Road to the easterly limits of the Village, if sold off separately to a depth of 200 feet, he valued, not restricted against business, at $75.00 per foot and restricted to residence use at $35.00 to $40.00 per foot (Record, 86). All the vacant land in the strip between Euclid Avenue and the Nickel Plate railroad, having a frontage on said railroad, is being held for industrial development (Record, 73), and even where there are tracts or parcels of land in said strip that do not front on the railroad, the same are equally valuable for industrial development in combination with the other

parcels between them and the railroad right-of-way (Record, 94).

Witness Witzel placed the value on Ambler tract of 68 acres at $8500 to $10,000 per acre, considered as unrestricted property (Record, 149), and if restricted to residence use, at $3,000 per acre (Record, 154). The Euclid Avenue frontage of the tract to a depth of 150 feet he valued at $150 per foot, if unrestricted, and if restricted to residence use, at $60 per foot (Record, 149). The vacant acreage between Chardon Road and Bell Avenue, north of North Street, he priced at $12,000 per acre unrestricted and at $3500 per acre if limited to residence use (Record, 150). The vacant land between Euclid Avenue and the Nickel Plate railroad, east of Bliss Road, unrestricted, he valued at $6,000 to $2,000 (Record, 150), the value decreasing as you go further east; if restricted against business, at $2500 per acre and graduated down as you go east (Record, 156). The Euclid Avenue frontage on the north side, east of Bliss Road, valued separately, he put at $30 to $50 per foot, if unrestricted, and $10 per foot less if restricted against business, explaining that there was little present demand for business development on this frontage (Record, 157). The greatest demand for industrial sites in the Cleveland industrial district he said was between East 152nd Street in the City of Cleveland and Chardon Road in Euclid Village (Record, 151).

Witness Laronge, testifying for appellant, placed the value of the Ambler tract, unrestricted, at $8,000 per acre (Record, 196), and if limited to residence use, at $2,000 per acre (Record, 202). The Euclid Avenue frontage, sold separately to a depth of 200 feet, he valued at $100 per foot, if available for business and at $60 to $75 per foot restricted to residence use (Record, 197). The vacant lands in the Village between Chardon Road and Bell Avenue,

north of North Street and south of the Nickel Plate tracks, he valued at $5,000 per acre for industrial purposes and $2,000 per acre, if limited to residence use (Record, 203). The vacant lands between Euclid Avenue and the Nickel Plate, east of Bliss Road, exclusive of the Euclid Avenue frontage, he valued as follows: That between Babbitt Road and the east limits of the Village, for manufacturing purposes, $3,000 to $4,000 per acre (Record, 198); for residence purposes, $1,000 to $1,500 per acre (Record, 202); between Bliss Road and Babbitt Road, $4,000 per acre unrestricted (Record, 198), and $1,000 to $1,200 per acre, limited to residence use (Record, 202). The Euclid Avenue frontage from Bliss Road to the east, sold off to a depth of 150 feet to 200 feet, he valued, if not restricted against business, at $75 to $100 per foot front (Record, 199), and if restricted to residence use, at $30 to $50 per foot (Record, 199).

Witness Greenlund, called by appellant, testified that the Ambler tract of 68 acres could be ideally developed for industrial purposes with switches set into the tract from the Nickel Plate railroad (Record, 190), but he thought the Euclid Avenue frontage could be more advantageously sold for other uses. He placed the value of the tract as raw land for residence allotting purposes, at $5,000 to $6,000 per acre (Record, 195); if cut up to sell in small parcels for industrial purposes at $8500 to $12,000 per acre (Record, 195). The Euclid Avenue frontage thereof to a depth of 150 feet, not restricted against business, he valued at $150 to $300 per foot (Record, 186), and if limited to residence use, at $75 to $100 per foot (Record, 180). The acreage east of Bliss Road, for industrial purposes, he priced at $3,500 to $2,000 per acre (Record, 182); the Euclid Avenue frontage thereof, sold separately to a depth of 150 feet along this same strip, he priced at $100

to $300 per foot, if not restricted against retail business, and at $40 to $75 per foot, if limited to residence use (Record, 182). He said that Euclid Avenue, within the Village of Euclid, was destined to become a business street (Record, 187), and that "It is fair to assume that business and manufacturing will locate north of Euclid Avenue and dominate that section" (Record, 194).

The witness Ambler gave the value of the 68 acres belonging to the appellee at $10,000 per acre for industrial development and at $2,000 per acre if limited to residence use (Record, 135). The Euclid Avenue frontage he thought could best be sold with the acreage behind. This frontage to a depth of 150 to 200 feet, he valued, if not restricted, at $100 per foot (Record, 136), and if restricted to residence uses, at $40 per foot (Record, 146). The vacant land between Chardon Road and Bell Avenue, north of North Street, he valued at $8,000 per acre, unrestricted (Record, 136), and if limited to residence use, at $1,800 per acre (Record, 137). The vacant acreage from Bliss Road to the easterly limits of the Village, he valued at $8,000 to $2,500 per acre, the greatest value being at Bliss Road (Record, 136). For residence development, he put its value at $1,750 to $1,000 per acre (Record, 137). The frontage on Euclid Avenue, east of Bliss Road, sold separately to a depth of 200 feet, he valued at $20 to $25 per foot, and only a little more if not restricted against business, because he thought that there was little, if any demand for business along that frontage, except at certain strategic corners (Record, 137).

The reason the land between Euclid Avenue and the Nickel Plate railroad has a low value for residence development is because most of it is rather low land between the ridge to the south and the Nickel Plate right-of-way (Record, 73, 94, 145), except a narrow strip toward the

easterly end of the Village, and homes built in such section would lie in close proximity to the industrial development along the two railroads.

The deposition of the witness Stein was taken and his testimony as to values in such form was submitted to the court below, subject to the objection of appellee. Whether his testimony was considered by the court is not certainly shown by the Record. In our opinion, he did not properly qualify as an expert (Record, 130, 131); he knew nothing about values generally in the metropolitan district (Record, 134). He considered adjacency of industrial plants to transportation facilities for employees as unimportant and even thought that track frontage for factory location was not a factor on which to base values (Record, 133). Generally he placed lower values on the Ambler tract than any other witness (Record, 128), but his figures for the vacant lands in the easterly part of the Village were similar to the other witnesses—he said the vacant lands in the easterly part of the Village were equally as valuable as those in the western part thereof (Record, 131).

Euclid Avenue throughout the Village is an 86 foot street, and Chardon and Bliss Roads are 60 foot streets. The smaller streets in the Village are 50 feet wide, except for a few so-called private streets, which are narrower. Ninety per cent. of the streets in the Village of Euclid are 50 feet wide or more (Record, 107 and 123); a large number of the streets in the City of Cleveland are not over 30 feet wide.

We have been obliged to extend this description of the location, development and value of lands in the Village because we are not able to agree with much of the matter set forth in appellant's brief under his heading of "Statement of Facts." We cannot find in the Record, evidence

or admissions sustaining some of the statements in appellant's brief and many other statements are so coupled up with argument of counsel or argument of witnesses, as shown by the Record, that we are unable to accept same as stating the essential facts of the case. We rely upon what we have set forth as indicating the real physical and economic conditions at the time of the adoption of the ordinance and the trial of the case below. The witnesses as to value generally agree that the land between Euclid Avenue and the Nickel Plate railroad is worth two or three times as much or more, if permitted to be developed for business, rather than being limited to residence use and we think they generally agree that the dominating demand for the lands in such part of the Village is for business purposes.

The witness, Robert Whitten, called by the appellant, whose testimony we believe was nearly all irrelevant and almost wholly argumentative, is found beginning on page 109 of the Record, testified as a zoning expert. He admitted (Record, 118, 119) that if the demand on the north side of Euclid was for business and industrial development and the values were as we have pointed them out, then Euclid Avenue would be a very satisfactory dividing line between the residence section to the south and the business and industrial section to the north of Euclid.

With such condition of affairs existing, the Village of Euclid on November 13, 1922, adopted a so-called zoning ordinance, which is found printed in the Record, commencing on page 13. After the filing of plaintiff's bill, this ordinance was amended by the council of the defendant Village before the hearing and entering of the decree below and in describing the ordinance we will consider it as so amended.

THE ORDINANCE.

Ordinance No. 2812 is found in the record beginning at page 13. Its complicated provisions and their application to the property of appellee can be understood only in connection with the so-called zone map referred to in Section 1 of the ordinance, which is found reproduced in the record opposite page 26. An amendment to the ordinance enlarges the territory shown as U 6 on said map in that the strip south of the Nickel Plate Railroad, which is there shown as 500 feet wide, was extended southerly to a line approximately parallel to Euclid Avenue and at an average distance of 750 feet north thereof. The average distance from Euclid Avenue to the Nickel Plate right of way is 1700 feet. In this enlargement some exceptions were made which are not important in this case. Later the map was further changed to establish a new U 3 district 130 feet wide, just south of the enlarged U 6 district. This change in the map is shown in one of the exhibits put in evidence but not printed. It is relatively unimportant in this case.

Before proceeding to a detailed discussion of the ordinance, which seems necessary to an understanding of its provisions, it is well to record that the Village of Euclid was at the time of the passage of this ordinance, and is now, a mere suburb of Cleveland, the major part of its area consisting of acreage property lying along two main line railroads. The recent industrial development of the City of Cleveland, following these railroad lines, has already reached the village and to some extent extends over into the village. In its obvious course, this industrial expansion will soon absorb the area in the village of Euclid for industrial enterprises. It is in restraint of this prospect that the ordinance seeks to operate. In effect it erects a dam to hold back the flood of industrial develop-

ment and thus to preserve a rural character in portions of the village which, under the operation of natural economic laws, would be devoted most profitably to industrial undertakings. This, the evidence shows, destroys value without compensation to the owners of lands who, it is alleged in the bill, have acquired and are holding them for industrial uses.

Since the industrial development of a great city will go on, the effect of this attempted action necessarily is to divert industry to other less suited sites, with a consequent rise in value thereof, so that the loss sustained by the proprietors of land who cannot so use their land is gained by proprietors of land elsewhere. In other words, the property, or value, which is taken away from one set of people, is, by this law, bestowed upon another set of people, imposing an uncompensated loss on the one hand and a gain which is arbitrary and unnatural on the other hand, since it results, not from the operation of economic laws, but from arbitrary considerations of taste enacted into hard and fast legislation. Such legislation also tends to monopolize business and factory sites.

The title of Ordinance 2812 is

> "An Ordinance establishing a zone plan, regulating the location of industries, trades, apartment houses, two family houses, single family houses and other uses of property, the area and dimensions of lots and yards, the bulk and alignment of buildings near street frontages."

By way of preamble, it is recited that the Village of Euclid is a residential suburb of the City of Cleveland, having two steam railroads within its corporate limits and a number of industrial plants therein; that the territory within said Village is available for manufacturing, industry, commercial and residential purposes; that a con-

siderable part of the property therein has been restricted for private residence purposes by the owners thereof and that much of the restricted property has been further limited to single residences; that the street, sewer and water systems of said Village have been designed and constructed to take care of such restricted use and would prove inadequate for more congested use; *that the territory made available by the ordinance for manufacturing, industrial and commercial uses is deemed and found to be sufficient for such purposes; that it is the desire of the citizens of said Village and the council thereof* TO PRESERVE THE PRESENT CHARACTER OF SAID VILLAGE and the public improvements therein, to prevent congestion, and to promote and provide for the health, safety, convenience, comfort, prosperity and general welfare of the citizens thereof, and that for all of these reasons the subject matter of the ordinance constitutes an emergency.

The ordinance is quite unintelligible without the zone map attached to it and made a part of it. Reading the ordinance and the map together it appears that:

> "For the purpose of regulating and restricting the locations of trade, industries, apartment houses, two family houses, single family houses, and other uses of property, the number of square feet of lot area per family house, the width of lots, the location and size of yards and the size and height of buildings, * * * the Village of Euclid"

is divided into three sets of classes; first, a set of six classes of use districts termed respectively U-1 to U-6 inclusive, second, three sets of height districts termed respectively H-1 to H-3 inclusive, and third, four classes of area districts termed respectively A-1 to A-4 inclusive. The area of the Village is thus divided on the map into three different kinds of districts, and it is provided in Section 1

> "No buildings or premises shall be erected or used except in conformity with the regulations herein prescribed for the respective use, height and area district in which such building or premises are located."

An examination of each of these sets of classes discloses the following:

(1) Use Districts.

By Section 1 the use districts are generically defined as follows:

> "Class U 1 or single family house districts, Class U 2 or two family house districts, Class U 3 or apartment house districts, Class U 4 or local retail and wholesale store districts, Class U 5 or commercial districts and Class U 6 or industrial and manufacturing districts."

In Section 2 definitions are given, and there we learn that

> "A 'family' is any number of individuals living and cooking together on the premises as a single housekeeping unit,"

that an apartment house is

> "a building arranged or designed to be occupied by three or more families living independently of each other and doing their own cooking upon the premises or by three or more individuals or groups of individuals living independently but having a common heating system and general dining room."

None of these definitions involve the limitation upon the number of people living together but only require that they shall be bound together by the accident of common cooking. The problems of congestion and sanitation dependent upon numbers all remain.

Further, in Section 2, Sub-section o-2, it is provided that

"A 'single family dwelling' shall consist of a basement containing not less than four hundred square feet and not less than three rooms and a bathroom."

In Sub-section p-1, a two family dwelling is described as

"a detached dwelling arranged, intended or designed to be occupied by two families, one of which has its principal living rooms on the first floor and the other of which has its principal living rooms on the second floor,"

and by Sub-section p-2

"A 'two-family dwelling' shall have a basement containing not less than seven hundred square feet and not less than four living rooms and a bathroom for each family."

It will be noticed that bath rooms must be placed in single and two family dwellings but are not required in apartment houses.

By Section 3 of the Ordinance an enumeration is made of the uses permitted upon each of the several classes of use district property beginning with U-1, and it is to be noted that the restrictions are progressive from the uses described in U-7 which are prohibited as nuisances, up to U-1, covering areas restricted for use by single family residences, that is to say, U-1 is the most restricted territory, in a U-2 district all of the uses permitted in U-1 districts and some additional uses are authorized, in a U-3 district all of the things permitted in U-1 and U-2 districts with some additions are permitted, and so forth.

Class U-1 uses are few in number. In such districts single family dwellings as above defined may be erected, public parks, water towers or reservoirs, and suburban electric railway passenger stations or rights of way may be established. Farming operations may be conducted and *non-commercial* green houses, nurseries and truck garden-

ing. The same uses with the addition of two family dwellings are permitted in U-2 districts. In both such districts the land may not be used to construct an apartment house, no church, school, library or museum may be erected there, no private club or philanthropic institution nor sanitarium, public playground, recreation building, city hall or court house, and their first possibility of existence is in U-3 districts. But even in U-3 districts, where apartment houses, hotels, churches, schools, libraries, museums, private clubs, playgrounds, court houses and city halls may be erected, it is still prohibited to erect any bank building, studio, telephone exchange, fire or police station, restaurant, theatre, retail store, job printing office, sales office or sample room, or wholesale store for hardware, drygoods or groceries. The latter list of prohibited uses may not be indulged in upon any property in areas designated on the map as U-1, U-2 or U-3 and are first tolerated in U-4 districts, which are generically termed local retail or wholesale store districts, but even in U-4 districts owners are prohibited from having stable or shed room for more than five horses or motor trucks, no matter how large their lot area, bill boards or advertising signs are prohibited, being first doubtfully admitted in class U-5 districts, and warehouses for the storage of building materials, contractors' equipment, coal, wood and household goods, no matter how large the lot, or how detached, substantial and fireproof the building may be, are prohibited.

Class U-6 districts are industrial, and in them are permitted penal or correctional institutions, institutions for the insane or feeble-minded, together with sewage disposal plants, garbage incinerators, rag storage, cemeteries and crematories, and manufacturing or industrial operations of any kind with those included in classes U-1 to U-5 inclusive.

U-7 uses correspond to no district, but consist of a number of prohibited uses of a nuisance character not permitted in the Village at all, about which no mention need here be made.

Section 7 of the Ordinance deals with certain accessory uses in residence districts, that is to say, in districts of the U-1, U-2, and U-3 classes. It is provided that an accessory use earlier defined as a use or building customarily incident to and located in the same lot with the use or building, must be pertinent to the class of use, and when so pertinent, will be permitted in the district in which such use is authorized, provided that the accessory use is located upon the same lot with the building or use to which it is accessory. That is to say, one might erect the kind of a garage which is appropriate for a single family dwelling in a U-1 district, but he could not erect in such district a garage appropriate for a two-family dwelling, every accessory use being required to be appropriate to the use in order to be tolerated in the district. But stated accessory use may be only on the same lot with the primary use, so that if a man owned two lots of fifty feet each he could not have his house on one and his garage on the other, as he might do if instead of owning two fifty foot lots he owned one one hundred foot lot. This is made more definite as Section 7 of the Ordinance proceeds. Thus in a U-1 or U-2 district, that is to say, districts in which either single family dwellings or two-family dwellings are permitted, the owners may not have a private garage providing storage for more than one motor vehicle for each 2,000 square feet of the lot area. But if the owner's land happened to be in a U-3 district, in which apartment houses, hotels, private clubs, city halls and court houses are permitted to be built, a private garage may provide storage for one motor vehicle for each 625 square feet of the area of the lot.

No bill board or sign board or advertising sign can be permitted as an accessory use, except only a sign of "for sale" or "for rent," and no sort of store, trade or business, can be regarded as an accessory use except that the office of a physician, dentist or musician may be located in the dwelling or apartment used by the physician, dentist or musician as his private residence, and except further that any person carrying on a customary home occupation may do so in his own house or apartment, provided that no person other than members of his own household are employed to assist him in that occupation, and no window display or sign board is used to advertise such occupation. Further, in a dwelling or apartment occupied as a private residence, while one or more rooms may be rented or table board furnished, still no window display or sign board may be erected to advertise such fact, and only when an owner's property has a U-3 district designation may a public dining room or restaurant be erected or operated on it. A lawyer apparently may practice law in his home, a teacher give language lessions in her apartment, but no sign on the outside of the house must indicate the fact, and if the owner of a house in a U-1 or U-2 district does dressmaking, no outside assistance can be employed, and if rooms are rented or meals furnished, no signs of "lodging to rent" or "board and lodging," however modest the sign, can appear on the premises.

By Section 10 of the Ordinance it is provided

> "in a class U-6 district no building or premises shall be used and no building shall be erected, which is arranged, intended or designed to be used except for a class U-1, U-2, U-3, U-4, U-5 or U-6 use."

That is to say, that all of the kinds of buildings and uses described in addition to those uses specifically provided for a U-6 district. To illustrate, a single family dwelling

(U-1), a two-family (U-2) an apartment house, hotel, city hall or court house (U-3), a bank, restaurant, police station (U-4), an ice manufacturing plant, laundry, blacksmithing shop (U-5), may all be located in a U-6 district, together with industrial establishments, but the same aggregation of miscellaneous and heterogeneous uses may not be had in a U-1 district. The public safety, health and welfare are just as much offended by a family next to a laundry in one place as another. The private interests of some residence property owners, however, may be strengthened by separation. How can it be said that this Ordinance is addressed to any of the well-known objects of the police power under such circumstances, for the Ordinance does not attempt to protect residences from the proximity of industrial undertakings, but only to protect certain sections of land from being occupied by both uses. This section conclusively shows that the Ordinance is not designed to protect the health, safety and comfort of the public. If it were, then the theory which excludes industrial undertakings from U-1 districts would exclude single family residences from U-6 districts.

Height Districts.

From the point of view of height the Village is divided into three kinds of districts, H-1, H-2 and H-3, as to which the restrictions are for class H-1 that no building shall be erected to a height in excess of two and one-half stories or 35 feet, except that a church, school or library may go to a height of four stories not in excess of 50 feet. In a class H-2 district the maximum permitted height is four stories not to exceed 50 feet, and in a class H-3 district a maximum of 80 feet is provided for all classes of buildings including those designed for residence purposes.

Area Districts.

From the point of view of area the Village is divided into four classes of districts, termed respectively A-1, A-2, A-3 and A-4. In a class A-1 district no dwelling or apartment house can be erected or altered to accommodate or make provision for more than one family for each 5,000 square feet of the area of the lot if an interior lot, or for each 4,000 square feet if a corner lot. In a class A-2 district the restrictions limit the area of a dwelling or apartment house to a minimum of one family for each 2,500 square feet of lot area if an interior lot or 2,000 square feet if a corner lot. In a class A-3 district the limitations require a minimum of 1,250 square feet of lot area per family if an interior lot or 1,000 square feet if a corner lot. In a class A-4 district no dwelling or apartment house can be erected or altered to accommodate or make provision for more than one family for each 900 square feet of the area of the lot if an interior lot or for each 700 square feet if a corner lot. Manifestly, if the health, safety and comfort of a family require 5,000 square feet of lot area in one part of the Village of Euclid they require it in all parts of the Village. Conversely, if the health, safety and comfort of a family are adequately provided for by a minimum of 700 square feet of lot area in any part of the Village of Euclid, the same minimum will serve the same purpose in every part of the Village. A family living in an A-1 district on 5,000 square feet of land will be obviously more prosperously environed than a family living in an A-2 district on 2,500 square feet of land, and an A-2 family will have a superior economic ostentation over an A-3 family living on 1,250 square feet of land. The A-3 family in like measure will be able to look down upon the A-4 family, who have only 900 square feet of area, and the arrangement thus made will body

forth an aesthetic prosperity in an ascending scale so that the wayfarer will know when he finally reached the A-1 inhabitants of the Village. But these considerations, however pleasing to the local pride of the officials of the Village, are not objectives for which the police power can be used. When the Village authorities have provided the minimum lot area which pure air, fire protection and disease control demand, they have exhausted the police power; further restrictions upon the use of private property by way of requiring certain areas per family are rights of ownership and not of regulation, and the public authorities may not under the guise of regulation exercise the rights of ownership.

By Section 17 of the Ordinance it is provided that in the class U-1, U-2 and U-3 districts no dwelling shall be erected on a lot having an average width of less than 40 feet, and in a class 2 district no double or two family house shall be erected on a lot having an average width of less than 45 feet. Single family dwellings and two family dwellings can therefore be erected in class U-4, U-5 and U-6 districts on lots narrower than 40 feet. That is to say, in a U-1 district where there are nothing but private dwellings, each of which has a minimum of 5,000 square feet of lot area, a private dwelling may not be erected on a lot narrower than 40 feet, but in a class U-4 district a private dwelling may be erected on a lot of any width in the midst of banks, restaurants, theatres, motion picture shows, retail stores, gasoline stations, skating rinks and dance halls.

Section 19 of the Ordinance deals with rear yards in residence districts. We pause to note only one of the restrictions which has to do with accessory buildings. An accessory building is one customarily incident to and located on the same lot with another use or building, but no such building may occupy more than 40% of the yard

or be more than 24 feet in height, and no such building, if detached from the main building, may be erected within 20 feet of any street line or within 10 feet of the rear lot line.

In Section 20 of the Ordinance dealing with side and rear yards in business districts a similar restriction is imposed.

By Section 22 of the Ordinance an attempt is made to regulate building lines and front yards, and it is there said that

> "for the purpose of regulating the alignment of buildings near street frontages, building lines are set forth on the building map which accompanies this Ordinance and which lines hereby are declared to be a part thereof and hereof and are hereby established."

There then follows a series of set back restrictions which are highly complicated and in a measure dependent upon the depths of the lots, as for instance

> "on a street frontage on either side of a street between two intersecting streets, but excluding the frontage along the side line of a corner lot, the distance of the building line, back from the street line, shall be 20 per cent of the average or normal depth of the lots having their front lines along such street frontage, but such distance back from the street line need not be more than 40 feet."

Similar side line restrictions are imposed.

By Section 22 of the ordinance various set back building lines are established. On Euclid Avenue, a street 86 feet wide, the set back in the residence territory is 50 feet. See also legend on zoning map.

By Section 23 of the ordinance there is established a "Board of Zoning Appeals" with powers as follows:

> "Any decision of the Inspector of Buildings made in the enforcement of this ordinance, may be appealed to The Board of Zoning Appeals, by any

person claiming to be adversely affected by such decisions. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this Ordinance, The Board of Zoning Appeals shall have power, in a specific case, to interpret any such provision in harmony with the general purpose and intent of this Ordinance so that the public health, safety and general welfare may be secured and so that substantial justice may be done."

Said ordinance in Section 25 thereof attempts, by its terms, to limit, restrict and control, the powers of the council and subsequently elected councils, in making amendments to the ordinance, as follows: It is provided that the council may amend the regulations and districts only after any proposed amendment shall have been referred to the City Planning and Zoning Commission for report, and that if such proposed amendment shall not have received the approval of said Zoning Commission the council shall not pass it except by a three-fourths vote; that if the owners of twenty per cent of the land within the area proposed to be altered shall protest, council shall not pass the amendment except by a three-fourths vote; that if a proposed amendment would transfer an area to a district having a less restricted use and a protest is presented by the owners of twenty per cent of the land adjacent to and "within two hundred feet from such area proposed to be transferred and within a more restricted use district than the district in which such area is proposed to be transferred such amendment shall not be passed except by a three-fourths vote of the council."

The only means offered by said ordinance to appellee to secure relief from or relaxation of the aforesaid restrictions and limitations upon the use of its lands is a provision in Section 25 that "whenever the owners of fifty per cent of the land in any area shall present a

petition duly signed and acknowledged to the council, requesting an amendment of the regulations prescribed for such area; it shall be the duty of the council to vote upon such amendment within ninety days of the filing of same by the petitioners."

In addition to the restrictions imposed by said ordinance upon the otherwise lawful use of appellee's lands, the ordinance imposes upon the owner of "any building or premises or part thereof where anything in violation of the ordinance shall be placed or shall exist or be maintained" a fine of not more than five hundred dollars, and it is provided that each day during which such violation shall continue shall constitute a separate offense.

EFFECT OF ORDINANCE ON LAND OF APPELLEE.

The sixty-eight acres of land belonging to the appellee indicated on the zoning map opposite page 26 of the record in red were zoned by Ordinance 2812 as follows:

The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630 feet wide north of Euclid Avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory. That is to say, upon the appellee's land next to Euclid Avenue and for a distance of 630 feet, no building may be erected or used except for a one or two family dwelling; upon the next 130 feet buildings may be erected for apartment house, hotel, church, school and other uses provided in class U-3; northerly from this last mentioned strip for a depth of about 1000 feet to the right of way of the railroad, permitted industrial uses are authorized.

APPLICABLE CONSTITUTIONAL PROVISIONS.

CONSTITUTION OF THE UNITED STATES, AMENDMENTS.

ARTICLE V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*.

ARTICLE XIV,

Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

CONSTITUTION OF OHIO.

ARTICLE I,

Section 1:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

Section 2:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly."

Section 19:

"*Private property shall ever be held inviolate but subservient to the public welfare.* When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, *and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury without deduction for benefit to any property of the owner.*"

Section 20:

"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people."

ARTICLE XVIII,

Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

ISSUES PRESENTED.

The foregoing facts and proceedings present to the Court for decision this issue of law:

> **Is Ordinance No. 2812 of the Village of Euclid a Valid Ordinance, as it Affects the Property of the Appellee, or is it Invalid in that it Violates the Protections Afforded by the Constitutions of the United States and Ohio to the Right of Property in the Appellee by Attempted Regulations under the Guise of the Police Power, which are Unreasonable and Confiscatory.**

Before proceeding to discuss this main issue we dispose of two other questions, (I) the timeliness of the application for relief, and (II), the extent and source of the legislative power of the Village of Euclid.

I.

THE TIMELINESS OF THE APPLICATION FOR RELIEF.

In the District Court, a motion to dismiss was filed, argued and overruled. (Rec. p. 27). The defendant then filed an answer and the case was matured for final hearing, heard and decided.

In the bill of complaint, the plaintiff alleged that it had acquired and held its sixty-eight acres of land in the defendant village for the purpose of selling it for industrial development; that Ordinance No. 2812 purported so to limit, restrict and control the lawful uses of said lands as to confiscate and destroy a great part of the value thereof; that the defendant village and the defendant Inspector of Buildings were enforcing said ordinance in accordance with its literal terms; that prospective buyers of land for industrial, commercial and residence uses in the metropolitan district of Cleveland were being deterred from buying

any part of this plaintiff's lands by the existence of said ordinance, being unwilling to consider land as to which it would be necessary for them to conduct burdensome and expensive litigation in order to vindicate their right to subject it to lawful and legitimate uses, and that so long as said ordinance remained in apparent force and effect, it would constitute a cloud upon the lands of the plaintiff, reduce and destroy their value and divert the normal industrial, commercial and residence development thereof to other and less favored locations, as to which no such illegal, oppressive and confiscatory limitations and restrictions had been attempted to be imposed. (Rec. p. 10.)

In the answer of defendant below, the defendant village denied these allegations and contended that property owners in the village had, in the zoning ordinance itself, remedies by way of appeal to the Board of Zoning Appeals and agitations for amendments to the ordinance, which ought to be exhausted before any right of action arose. (Rec. p. 38.) In the argument below it was alleged, as it is here, that the Ambler Realty Company could have no matured right of action until it had first made application for a permit as to specific proposed uses of its lands, taken appeals from refusals to grant such permit and filed petition with council of the village for such amendments as it might deem necessary.

The trial court in the final decree found the facts alleged by the plaintiff in its bill to be true. (Rec. p. 62). In the opinion of the court (297 Fed. Rep. 309, Rec. p. 53) the court specifically found with regard to this question:

> "The evidence clearly shows that the normal and reasonably to be expected use and development of plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the

residue, including the restricted area, is for industrial and trade purposes. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its market value to the extent of several hundred thousand dollars. The restrictions, if sustained, the evidence further shows will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes."

Proceeding upon this finding of facts, the District Court held that there could be no doubt as to the jurisdiction of a court of equity to grant relief if the ordinance were, in fact, void. The court says:

> "It was enacted under color of authority and is apparently valid. While it is outstanding it creates a substantial cloud upon plaintiff's title and the only adequate relief is a decree ascertaining and declaring its invalidity and cancelling the cloud."

We respectfully submit that the trial court correctly stated the power and duty of a court of equity in such a situation.

The wrong done to the plaintiff below was done when the ordinance was passed and continues as long as the ordinance is in existence. Prospective purchasers of land for commercial and industrial development will not even consider the plaintiff's land so long as the ordinance is in existence. To require the plaintiff to wait until he can find a purchaser sufficiently brave and sufficiently patient to buy a site in the teeth of this ordinance, bear the cost and delay of preparing plans, applying for a permit and having it rejected, perfecting an appeal and having it denied, and then exhausting the possibilities of petitions for amendment of the ordinance, which would permit the proposed use, would, in fact, deprive the plaintiff of any rem-

edy whatever, for no such complaisant purchasers can be found in a competitive real estate market. The plaintiff and others similarly situated with regard to their lands would simply be required to sit still and see the normal industrial and commercial development diverted, as purchasers passed them by and took less desirable land, free from the necessities of protracted litigation, in preference to the lands in the Village of Euclid, each acre of which would require litigation and lobbying before it could be devoted to entirely lawful and normal uses.

Ordinance No. 2812 is penal in character. That a court of equity will enjoin the enforcement of a void statute where the legal remedy is inadequate is no longer open to question, in view of the decisions of this Court.

In *Kennington vs. Palmer,* 255 U. S. 100, it is said in the syllabus:

> "Equity will enjoin criminal prosecutions threatened in a void statute, the legal remedy being inadequate."

To the same effect was the decision and holding in *U. S. vs. Schwartz* and *U. S. vs. Smith,* 255 U. S. 102. A similar exercise of the power of a court of equity was exhibited in *Adams vs. Tanner,* 244 U. S. 590, where a law of the State of Washington forbidding employment agents from receiving fees from the workers for whom they found places of employment was held void and its enforcement prohibited. The same principle is clearly announced by this Court in *Truax vs. Raich,* 239 U. S. 33. See also *Bloch vs. Hirsch,* 256 U. S. 135; *Brown Holding Co. vs. Feldman,* 256 U. S. 170.

Both on principle and authority the power of a court of equity in such situations is clear. Where there is no adequate remedy at law, the court will not force a complainant to stand idly by and see the value of his property

diminished or transferred to others, by the illegal action of a municipal corporation, but will enjoin the enforcement of the invalid ordinance and so prevent the continuing wrong of its presence on the statute books and the menace which it presents to the plaintiff's rights and to those who buy from the plaintiff. As a matter of fact, the plaintiff in the court below has high prerogative rights which can find no adequate protection except in a court of equity. If I own land and some one commits a trespass upon it, an action at law makes me whole. The case is different, however, if while I own land, some authority, clothed with the power to make laws, promulgates, with regard to my ownership, unconstitutional restrictions and limitations and writes into a statute book that while I may continue to hold the legal title, I may not, either for myself or my grantees, enjoy the full benefit of the land. In such a case if the lawmaking power goes beyond its constitutional license and violates the rights guaranteed to me as a land owner by the Constitution of the United States, then a court of equity alone can make me whole and restrain the wrong which, being done under color of law, commands respect and obedience until the judicial voice is interposed to quiet my right of enjoyment and establish my right to the legitimate use of my property.

II.

THE EXTENT AND SOURCE OF THE LEGISLATIVE POWER OF THE VILLAGE OF EUCLID.

The so-called zoning ordinance and the amendments thereto are attempts by the legislature to exercise the so-called police power. A brief reference to the power of Ohio municipalities is, therefore, justified.

By the Eighteenth Amendment to the Constitution of Ohio, adopted September 12, 1912, municipal corporations are recognized, classified and directly endowed with power. This amendment is known in Ohio as the Home Rule Amendment and the power given by it is specified and placed beyond the power of the General Assembly either to enlarge or diminish except to the extent that the constitutional amendment itself authorizes control by general statute. Control of this kind is limited to three particulars:

(1) Limitations upon taxation and debts.

(2) Provision for examination of municipal books of account by a state bureau.

(3) Certain general laws authorized to be passed providing methods of incorporation and modes of government to apply to municipal corporations which do not elect to enact their own charters.

Except for the limitations above indicated, municipal corporations in Ohio draw their power directly from the constitution, and while the legislature retains power by statute to deal with subjects of general and common interest to all municipalities, and to direct mutual agencies in their cooperation with one another in furtherance of state wide and county objects, it is nevertheless true that all the "power of local self-government" is given to municipal corporations directly by Section 3 of Article XVIII of the Ohio Constitution, as quoted above, and no enabling legis-

lation by the state legislature is necessary or appropriate on the subject.

In 1915 the Legislature of Ohio enacted a statute authorizing the councils of municipalities to establish planning commissions and later in 1919 amended the act so as to authorize zoning. This act and the amendment thereto are printed in the margin as General Code, Sections 4366-1 to 4366-12. The zoning sections added by the amendment of 1919 comprise sub-sections -7 to -12 of the act, and they purport to authorize city planning commissions to divide municipalities into zones or districts, based upon three classes of considerations:

(1) The use of buildings and other structures;

(2) The heights of buildings;

(3) Bulk, location and percentage of occupancy.

In view of the existence of this constitutional provision and this enactment of the Legislature, some confusion might arise as to the source and extent of the power of the Village of Euclid. The Supreme Court of Ohio has, however, set all question at rest on this subject. In the *Village of Perrysburg vs. Ridgway*, 108 O. S. 245, it is held:

> "Since the Constitution of 1912 became operative, all municipalities derive all their powers of local self-government from the Constitution direct, by virtue of Article III, Section 18 thereof. * * *
>
> "The above constitutional grant of power to municipalities is 'self-executing' in the sense that no legislative action is necessary in order to make it available to the municipality."

This case was brought to test the validity of an ordinance of the Village of Perrysburg, passed to regulate the operation of motor busses within the municipal limits. The ordinance was held to be a police regulation within the

power of local self-government and therefore to rest upon the constitutional donation of power.

This question is not important in this case since the appellee denied below the power of the Legislature of Ohio or of the Village of Euclid. Whether Ordinance No. 2812 rests for its authority upon the "power of local self-government" granted by Section 3 of Article XVIII of the Constitution, or upon the attempted donation of power to municipal corporations by Sections 4366-1 to 4366-12 of the General Code, the same tests must be applied to its validity, and those tests are whether or not that ordinance is a reasonable and real exercise of the police power or an unreasonable and arbitrary exercise of the legitimate powers of local self-government and an impairment of the rights of property guaranteed to the appellee below by the Constitutions of the United States and of Ohio.

OHIO GENERAL CODE.

CITY PLANNING COMMISSION.

SEC. 4366-1. The council of each municipality may establish a city planning commission, consisting of seven members, the mayor, the service director, the president of the board of park commissioners, and four citizens of the municipality, who shall serve without compensation, and who shall be appointed by the mayor for term of six years, except that the term of two of the members of the first commission shall be for three years. Whenever such a commission is appointed, it shall have all the powers conferred in Sec. 4344 of the General Code.

SEC. 4366-2. The powers and duties of the commission shall be to make plans and maps of the whole or any portion of such municipality, and of any land outside of the municipality, which in the opinion of the commission bears relation to the planning of the municipality, and to make changes in such plans or maps when it deems same advisable. Such maps or plans shall show the commission's recommendations for new streets, alleys, ways, viaducts, bridges, subways, parkways, parks, playgrounds, or any other public grounds or public improvements; and the removal, relocation, widening or extension of such public works then existing. With a view to the systematic planning of municipalities, the commission may make recommendations to the mayor, council and department heads concerning the location of streets, transportation and communication facilities, public buildings and grounds. The commission shall have the power to control, preserve and care for historical land marks; to control in the manner provided by ordinance the design and location of statuary and other works of art, which are or may become the property of the municipality; and the removal, relocation and alteration of any such works belonging to the municipality; and the design of harbors, bridges, viaducts, street fixtures and other public structures and appurtenances. Whenever the commission shall have made a plan of the municipality,

THE MAIN QUESTION.

As stated above, the real question in this case is whether Ordinance No. 2812 of the Village of Euclid, as amended, is a valid police regulation of the property of the appellee in the village.

The trial court held, 297 Fed. 309 that:

> "The evidence clearly shows that the normal and reasonably to be expected use and development of the plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the residue, including the restricted area, is for industrial

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or any portion thereof, no public building, street, boulevard, parkway, park, playground, public ground, canal, river front, harbor, dock, wharf, bridge, viaduct, tunnel, utility (whether publicly or privately owned) or part thereof shall be constructed or authorized to be constructed in the municipality of said planned portion of the municipality until and unless the location thereof shall be approved by the commission; provided that in case of disapproval the commission shall communicate its reasons for disapproval to council, and the department head of the department which has control of the construction of the proposed improvement or utility; and council, by a vote of not less than two-thirds of its members and such department head shall together have the power to overrule such disapproval. The narrowing, ornamentation, vacation or change in the use of streets and other public ways, grounds and places shall be subject to similar approval, and disapproval may be similarly overruled. The commission may make recommendations to any public authorities or to any corporations or individuals in such municipality or the territory contiguous thereto, concerning the location of any buildings, structures or works to be erected or constructed by them.

SEC. 4366-3. The municipal planning commission shall be the platting commission of the municipality, and all the powers and duties provided by law for platting commissioner or commissioners of municipalities shall upon the appointment of a municipal planning commission under this act, be deemed transferred to such commission.

SEC. 4366-4. Council may authorize the commission to control the height, design and location of buildings.

SEC. 4366-5. The commission shall have power to control, appoint or employ such architects, engineer and other professional service, and to appoint such clerks, draughtsmen and other subordinates as it shall deem necessary for the performance of its functions; the expenditures for such service and employments to be within the amounts appropriated for such persons by the council of the municipality; and council shall provide for the expenses and accommodations necessary for the work of the commission.

SEC. 4366-6. This act shall take effect and be in force January 1, 1916.

SEC. 4366-7. The city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the munici-

and trade uses. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its present market value to the extent of several hundred thousand dollars. The restrictions, if sustained, the evidence further shows, will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes."

Assuming these facts, which we believe to be conclusively established by the evidence, the question is: Has the Village of Euclid the power to impose this damage upon the appellee? Primarily the Court's attention must be

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pality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitations and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act (G. C. §§ 4366-7 to 4366-12).

SEC. 4366-8. Whenever the city planning commission of any municipality or any board or officer with city planning powers, whether such commission, board or officer is created under state statute or municipal charter, or the planning commission of any village appointed under the provisions of section 4366-7, certifies to the council or other legislative body of the municipality any such plan for the districting or zoning of the municipality according to the uses of buildings and other structures and of premises, then said council or other legislative body, in the interest of the promotion of public health, safety, convenience, comfort, prosperity or general welfare, may regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence or other specified uses, and for said purposes divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. For each of such districts regulations may be imposed designating the kinds or classes of trades, industries, residences or other purposes for which buildings or other structures or premises may be permitted to be erected, altered or used subject to special regulations.

SEC. 4366-9. Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municipality according to the height of buildings and other structures, then such council or other legislative body, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, may regulate and limit the height of buildings and other structures thereafter erected or altered and for said purpose divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation

directed to the restrictions sought to be imposed by the ordinance upon the land of the appellee. Since, however, it is claimed by the appellant that Ordinance No. 2812 is a comprehensive piece of legislation and that the damage suffered by the appellee is merely the incidental result of a large scheme enacted in the general public welfare, it is necessary for the Court to consider No. 2812 generally.

When this is done, we believe that it will be found that the ordinance does not, in fact, pursue any rational plan, dictated by considerations of public safety, health and welfare upon which the police power rests. On the contrary it will appear that the ordinance is an arbitrary

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imposing a lower height limitation than may be provided by state statute shall, within the district for which it is imposed, prevail over the said limitation provided by state statute.

SEC. 4366-10. Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municipality according to the bulk and location of buildings and other structures (including percentage of lot occupancy, set back building lines, and area of yards, courts and other open spaces), then such council or other legislative body may, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, regulate the bulk and location of buildings and other structures thereafter erected or altered, the percentage of lot occupancy, set back building lines and the area of yards, courts and other open spaces and for said purposes may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation imposing a less percentage of lot occupancy, wider or larger courts, deeper yards or other more strict limitations than those provided by state statute shall within the district for which it is imposed, prevail over the said limitations provided by state statute.

SEC. 4366-11. The districting or zoning of any municipality or part thereof may be based upon any combination of two or more of the purposes described in the foregoing three sections. In the determination and establishment of districts as above provided, buildings and other structures may be classified on the basis of the nature or character of trade, industry, profession or other activity conducted or to be conducted therein, the number of persons, families or other group units to reside in or use them, the public, quasi-public or private nature of the use thereof, or upon any other basis or bases relevant to the promotion of the public safety, health, morals, convenience, prosperity or welfare. The council or other legislative body may, from time to time, amend or change the number, shape, area or regulations of or within any district or districts; but no such amendment or change shall become effective unless the ordinance proposing such amendment or change shall first be submitted to the planning commission, board or officer for approval, disapproval or suggestions and the planning commission, board or officer shall have been allowed a reasonable time, not less than thirty days, for consideration and report. The council or other legislative body may create

attempt to prevent the natural and proper development of the land in the village prejudicial to the public welfare, in that it prohibits the business and industry of the metropolitan district of Cleveland from access to land economically most available. By so doing it imposes upon the general welfare the burden of having the business and industry of the Village of Euclid and of the City of Cleveland diverted to less favorable and less available lands in order to maintain a rural character for certain residence property. This property in the interest of the public welfare, should be devoted to those industrial uses for which it is needed and most appropriate.

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an administrative board to administer the details of the application of the regulations and may delegate to such board, in accordance with general rules and regulations to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations and to administer the regulations as specified therein; or these administrative powers and functions may be delegated by the council or other legislative body to the planning commission or board. Before any ordinance, measure or regulation authorized by this and the three foregoing sections may be passed, the council or other legislative body shall hold a public hearing thereon, and shall give thirty days' notice of the time and place thereof in a newspaper of general circulation in the municipality; and during said thirty days the text or copy of the text of such ordinance, measure or regulation, together with the maps or plans or copies thereof forming part of or referred to in said ordinance, measure or regulation and the maps, plans, and reports submitted by the planning commission, board or officer shall be on file, for public examination, in the office of the clerk of the council or other legislative body or in such other office as may be designated by the council or other legislative body. No such ordinance, measure or regulation which violates, differs from or departs from the plan or report submitted by the planning commission, board or officer shall take effect unless passed or approved by not less than three-fourths of the full membership of the council or other legislative body.

SEC. 4366-12. Nothing contained in the foregoing sections 4366-7 to 4366-11 inclusive shall be deemed to repeal, reduce or modify any power granted by law or charter to any municipality, council or other legislative body of a municipality nor to impair or restrict the power of any municipality under Article XVIII of the Constitution of Ohio.

Should any section or provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof other than the part so decided to be unconstitutional.

Nothing herein shall be construed as authorizing a municipality to reserve the use of any private property for future public use for the purpose of extending or widening streets.

Therefore, while it will be necessary for us to discuss "zoning" and point out what we believe to be the point of collision between the so-called zoning power and the Constitution of the United States, the appellee's primary interest is to protect its property against the damage wrought by this particular ordinance.

That municipalities have power to regulate the height of buildings, area of occupation, strengths of building materials, modes of construction and density of use, in the interest of the public safety, health, morals and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established. We believe it, however, to be the law that these powers must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses or diminish its value by imposing restrictions which have no other basis than the momentary taste of the public authorities. Nor can police regulations be used to effect the arbitrary desire to have a municipality resist the operation of economic laws and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises.

The municipal limits of the Village of Euclid are, after all, arbitrary and accidental political lines. The metropolitan city of Cleveland is one of the great industrial centers of the United States. If the Village of Euclid may lawfully prefer to remain rural and restrict the nor-

mal industrial and business development of its land, each of the other municipalities, circumadjacent to the City of Cleveland, may pursue a like course. Thus the areas available for the expanding industrial needs of the metropolitan city will be restricted, the value of such land as is left available artificially enhanced and industry driven to less advantageous sites. All this would be done at the expense of those land owners whose lands, being most advantageously located from an industrial point of view, have as a part of their right of property, which the Constitutions of the Nation and the States undertake to protect, the expectation of value due to their superior availability for industrial development.

The Supreme Court of Ohio in *Kahn Bros. vs. Youngstown,* 113 O. S. 17 and *Pritz vs. Messer,* 113 O. S. 89, cases which it will be necessary to refer to more at large, has considered both of these questions. In *Pritz vs. Messer,* paragraph 1 of the syllabus, it is said:

> "Laws enacted in the *proper* exercise of the police power *which are reasonably necessary for the preservation of the public health, safety and morals,* even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private property' within the meaning of the constitutional requirements as to making compensation for the taking of property for public use and as to the deprivation of property without due process of law." (Italics supplied.)

A reading of this case will sustain the view above expressed that the name "police power" may not be made a cloak for an unreasonable invasion of the right of private property.

In *Kahn Bros. vs. Youngstown* the Supreme Court of Ohio held an ordinance invalid which established only a fraction of the territory of a municipality into a district

and prohibited the erection therein of any building to be used as a dwelling, except single or two-family dwellings. The grounds of the decision were two-fold, first, that the record showed the district in question "a most healthful part of the municipality in which to erect an apartment house" and that "the public health, morals and safety of the district and of the entire municipality will not be impaired by the erection of such an apartment house"; hence the prohibition of the apartment house, therein, constituted a taking of property without due process of law and second, it was held by the court that a mere district ordinance differed from a comprehensive ordinance since it did not take into view or serve the public welfare of the whole population of the municipality. From any point of view, except one limited to the imaginary and accidental lines which bound the Village of Euclid, the village is but a district of the City of Cleveland. The public affected by the regulations which it enacts is the whole public of the metropolitan area of which it is a part. If the Village of Euclid is to be accorded the right adversely to affect the welfare of the metropolitan district by its restrictive regulations and the same right goes to all the other villages which surround Cleveland, it could, by the same logic, be accorded to the various wards in the City of Cleveland and we would thus have the business and industrial life of the great metropolitan area throttled by innumerable competitive local regulations, none of which are based upon considerations of the general, as distinguished from the very local, and partial public welfare.

ARGUMENT.

In the opinion of the court below it is said, 297 Fed. 314:

> "Obviously the 'police power' is not susceptible of exact definition. It would be difficult, even if it were not unwise, to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power; and it is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when that is done the difficulty disappears. A law or ordinance passed under the guise of the police power, which invades private property as above defined, can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals or public safety. The courts never hesitate to look through the false pretense to the substantial."

The distinction drawn in the foregoing between the power of eminent domain and the police power is important. The most complete and perfect private title to property, is, under our constitutional system, subject to this limitation,—that in case of necessity it may be taken for the public good and no private or sentimental consideration on the part of the private owner will be permitted to halt or obstruct that progressive development upon which the general welfare of society depends. But this power of society to take property from the individual *in invitum* is strictly safeguarded by Federal and state constitutions generally.

In the first place, there must be a public need, the property proposed to be taken must be taken for a public use, all the forms of law must be observed in the taking and the private owner ultimately compensated. The courts do not allow the private owner to argue with the

legislative authority in the exercise of its discretion as to what is a public need and his opinion is not important in the definitions of a public use, but the books are full of cases in which the exercise of this power has been stayed, even against the legislative determination, where the proposed use was only colorably public and the plain purpose of the appropriation was private advantage, no matter how widely distributed. Even where the owner is to be fully compensated, his right to retain and use his own property is protected unless there is a real, as against a pretended, public need to take it and use it.

Quite different is the police power under which the ordinance in this case purports to be passed. In every ordered society the state must act as umpire to the extent of preventing one man from so using his property or rights as to prevent another or others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a fire trap is limited by the rights of other people not to have their houses subjected to the peril created by it. The right of a man to maintain a nuisance on his own property is limited by the rights of others not to be subjected to the danger of its proximity. Accordingly, the so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety or morals of others, or affect prejudicially the general public welfare.

The limitations imposed by the police power do not have to be compensated for, for the reason that they are inherent in the ownership. If I buy a piece of land I have no means of knowing whether or not it will be needed for the public use, and if any need develops, I must be compensated when the public takes it. But I always know when I buy land, that I may not devote it to uses which endanger the safety, health or morals of others or make

its use a common nuisance to the prejudice of the public welfare. Because of its nature, the exercise of the police power has always been restrained to those uses of property which invade the *rights* of others, and courts consistently decline to permit an extension of the police power to uses of property involving mere questions of taste or preference or financial advantage to others. The public welfare, for which the police power may be exercised, which views merely the desire of a part of the people in a municipality to maintain a rural character for their residences by forbidding other land owners to devote their nearby lands to legitimate and inoffensive business uses, is not wide enough. Unless the theory of our expanding civilization is wrong, the public welfare is advanced by the devotion of the most available sites to business and industry, as the need for them develops.

Under our constitutional guaranties, and in accordance with our legal traditions, owners of property have been protected in the completeness of their ownership except as the public need was asserted through the right of eminent domain, and the public safety asserted through the police power. Restrictions upon limited areas have always been established, when desired, by mutual contracts, and such restrictions have been upheld so long as they were reasonable, in view of the changing relation of the land to which they applied to the general growth and development of the country. It has, however, only recently been suggested that use restrictions, which formerly lay in contract, may be imposed or abrogated by municipal regulation and that the fleeting legislative judgment and will of a municipal council can select which, out of a variety of admittedly innocent uses, it will permit the owners of land to enjoy.

Yates vs. Milwaukee, 10 Wall. 497, 505.

We believe it to be the law that regulations sought to be imposed by laws or ordinances must have a real and substantial bearing upon the public health, public safety, public morals or general public welfare, and that a belief, no matter how fervently or widely entertained, that municipal authorities can assert some sort of communal control over privately owned land is at variance with the fundamental nature of private ownership and in derogation of that protection of private ownership, for which the applicable provisions of bills of rights and constitutions were made among us.

Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land. The case against many of these zoning laws, however, is much stronger than this. The world has not reached a unanimous judgment about beauty, and there are few unlikelier places to look for stable judgments on such subjects than in the changing discretion of legislative bodies, moved this way and that by the conflict of commercial interests on the one hand, and the assorted opinions of individuals, moved by purely private concerns, on the other. We respectfully submit that counsel for appellant, in his fervor for an extension of the police power which will permit municipalities to accomplish all the great goods at which zoning aims, overlooks the fact that, after all, this is merely a desire of some people to tell other people how to use their property.

Perhaps the most often quoted definition of the police power is that of Judge Cooley:

> "The police power embraces the whole system of internal regulation by which the state seeks not only

to preserve public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of *rights* and to insure to each the uninterrupted enjoyment of his own rights so far as is reasonably consistent with a like enjoyment of rights by others." *Cooley's Constitutional Limitations,* 7th Ed. p. 245.

It will be noted that this definition limits the power to the establishment of rules to prevent the conflict of *rights.*

In the case of *Truax vs. Corrigan,* 257 U. S. 336-338 the Chief Justice says of the constitutional guaranties in question:

"The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller v. Oregon,* 208 U. S. 412, that 'It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' "

On page 768 of his *Constitutional Limitations,* Judge Cooley seems to have had in mind almost the same situation presented by the case at bar, though he was there dealing with the law of eminent domain, under which the property owner whose right of private ownership is disturbed is compensated.

"It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift and comfort to the country and thereby invite settlement, increase the value of lands and cultivate the

public taste but the common law has never sanctioned an appropriation based on these considerations alone."

How much less then, if these objects may not be accomplished by the power of the state which compensates the private owner, may they be accomplished by a mere fiat of the state at the expense of the private owner.

At page 839 of the same treatise, Judge Cooley, discussing the police power and the right of contract, quotes with approval the language of Christiancy, J., in *People vs. Jackson and Michigan Plank Road*, 9 Mich., 285, 305, referring to the police power, as follows:

> "Powers, which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity as to lead to the natural and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

In *Tiedeman's State and Federal Control of Persons and Property*, Section 146, referring to police power, it is said:

> "The legislative prohibitions or regulation of the use and enjoyment of one's private property and land is in violation of constitutional principles when it is not confined to the prevention of a nuisance."

Freund in his work on *Police Power*, Section 511, uses the following language:

> "The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation and it applies no matter for what purpose the prop-

erty is taken. If it is recognized that a change of grade entitles to damages, the right cannot be denied on the ground that the change was demanded by considerations of public safety."

* * * * *

"Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the State takes property by eminent domain because it is useful to the public and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.' "

"From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

This Court, in the case of *Munn vs. Illinois*, 94 U. S. 113, sustained the police power of the State of Illinois in the regulation of grain elevators, because such property was held to be affected with a public use, but the court sharply declined to regard the rule then established as an invasion of rights purely private. Thus the Court says:

"This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorp vs. Railroad Company*, 27 Vt. 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another."

In *Munn vs. Illinois*, Mr. Justice Field filed a dissenting opinion. Clearly the views therein expressed were rejected by this Court as to property affected with a public use and devoted to industries like transportation or grain elevating, which so vitally affect the general interest. The

statement made by Mr. Justice Field with regard to the constitutional protection of the right of purely private property not so affected is, we believe, the law. On page 142 it is said:

> "The same liberal construction which is required for the protection of life and liberty in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of the state, under pretense of providing for the public good or for any other reason, can determine, against the consent of the owner, uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation and destruction. If, for instance, the owner is prohibited from using his building for the purpose for which it was designed, it is of little consequence that he is permitted to retain title and possession. * * * He is for all practical purposes deprived of the property as effectually as if the legislature had ordered his forcible dispossession. * * * There is, indeed, no protection of any value in the constitutional provision which does not extend to the use and income of the property, as well as to its title and possession."

See also *Coppage vs. Kansas,* 236 U. S. 1, pp. 18 and 19; *Wolf Packing Company vs. Court of Industrial Relations,* 262, 522, 267 U. S., 552, 569, and particularly *Buchanan vs. Warley,* 245 U. S. 72.

The case last cited involved a statute passed by the Legislature of Kentucky, limiting the right of colored people to purchase houses and live in residential districts predominantly occupied by white people. The act was held unconstitutional. Speaking of the purpose of the law, the Court says, by Mr. Justice Day:

> (p. 73) "This drastic measure is sought to be justified under the authority of the state in the exer-

cise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

(p. 81) "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinances, are not prohibited.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to so do to a person of color, and of a colored person to make such disposition to a white person.

"It is urged that the proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said such acquisition by colored persons depreciates property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results."

In the case of *Pennsylvania Coal Company vs. Mahon.* 260 U. S. 393, there was involved the constitutionality of an act of the State of Pennsylvania limiting the right of

property owners to take coal from under the streets and highways of municipalities where it might cause unsafe conditions. Clearly here was a purpose to protect the safety of the public and yet the act was held unconstitutional. Mr. Justice Holmes, writing the opinion said:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Cases cited.) When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. * * * In general it is not plain that a man's misfortune or necessities will justify his shifting the damages to his neighbor's shoulders. (Cases cited.) *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" (Italics ours.)

Commenting upon the foregoing cases, the Court below said:

> "The principles of law therein announced, while dealing with different facts, are pertinent to the present case because of the clearly defined limitations set to the legislative disposition to extend the police power until private property is destroyed and the guaranties of the Constitution are annihilated."

See also *Eubank vs. Richmond*, 226 U. S. 137.

DANGER OF ENCROACHMENT ON CONSTITUTIONAL RIGHTS.

It has not been difficult for this Court to vindicate the great guaranties of the Constitution against direct attack. The trouble comes when these guaranties of individual rights of liberty and property appear to stand in the way of some genuinely benevolent and praiseworthy object which enlists support or enthusiasm, and when only a little infringement of the right of the individual is asked to be indulged. In such cases, this Court is often asked to stand aside and relax its guardianship over the Constitution in deference to the legislative discretion, which the Court is always prompt to recognize as belonging to a coordinate branch of the government. Yet the danger of frittering away the constitutional guaranties by successive encroachment has always been apparent to the courts. In Ohio this danger has been pointed out by the most eminent judges in our judicial history. In the case of *Railway Company vs. Commissioners*, 1 O. S. 77, 86, Judge Ranney said:

> "But, as the General Assembly like the other departments of Government, exercise only delegated authority, it cannot be doubted, that any act passed by it, not falling within the scope of legislative power, is as clearly void as though expressly prohibited. And we entirely agree with the Supreme Court of Pennsylvania in *Parker v. Commonwealth*, 6 Barr. 511, that 'it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will generally be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong.'"

In the case of *Miller vs. Crawford,* 70 O. S. 207, 214, Judge Schauck says:

> "The conception that the legislature has creative power, by whose general exercise it may confer rights upon some without despoiling others, being without foundation in reason, is without rational limitation. That conception appears as the prompting of all legislation which is solicited and obtained by classes to aid them in the rivalries of business. Whatever may be thought of some legislation in which there is general acquiescence, no one would considerately say that these provisions of the constitution permit legislative participation in such rivalries."

And the same Judge in the case of *Williams and Thomas vs. Preslo,* 84 O. S. 345, in meeting the claim that legislative acts should not be adjudged unconstitutional upon doubtful considerations, said:

> "But nothing would be more fatal to the efficient exercise of the judicial function in constitutional government than to invoke, for the purpose of raising doubts, a rule devised for solving them. In that respect it is quite like the familiar rule respecting reasonable doubts as a test of the probative effect of evidence in criminal cases. He has been an inattentive student of the history of the state who thinks that public or private injury has resulted from a too devoted adherence to the provisions of the organic law. It seems to us that this act very plainly from its nature, takes its place among the enactments which constitute the promoted legislation of the state not suggested by comprehensive views of the rights and interests of all the people, but furthered by those who desire to obtain advantages not accorded by the general laws."

In *Coppage vs. Kansas,* 236 U. S. 1-18 it is said:

> "But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or prop-

erty rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restrictions of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

In *Boyd vs. United States,* 116 U. S. 616, at page 635, Mr. Justice Bradley said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

RULINGS IN THE STATE COURTS.

It is impossible to reconcile the rulings of the Supreme Courts of the States upon the questions here presented. Each case is, of course, decided on its own facts. Many of them presented familiar restrictions, more or less demonstrably involving the public safety, health or morals. In some of the cases, although the opinions seem to sanction very wide extensions of the traditional police power, the facts involved do not necessitate the width of the rulings, but even this consideration does not make it possible to follow through these cases any thread which leads to an authentic definition and application of the constitutional restraints upon unlimited extensions of the police power.

Synoptic notes are found appended to *Spann vs. Dallas,* (Tex) 19 A. L. R. 1387, 1395, *Fitzhugh vs. Jackson,* (Miss.) 33 A. L. R. 279, 287, and *State ex rel. Austin vs Thomas,* (W. Va.) 38 A. L. R. 1490, 1496.

The first of these cases, *Spann vs. Dallas,* was decided by the Supreme Court of Texas in 1921. It holds that an ordinance forbidding the erection of a building for a store in a residence district, without consent of neighboring property owners and the approval of the building inspector, deprives the owner of his property without due process of law. The seventh paragraph of the syllabus says:

> "A law which assumes to be a proper regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensation."

In the able opinion by the Chief Justice, it is disclosed that the question presented was the validity of the ordinance of the City of Dallas, prohibiting, under penalty,

the construction of any business house within what the ordinance denominates a residence district of the city, except with the consent of three-fourths of the property owners of the city and with the building inspector's approval of the design of the proposed structure. The decision of the Court is not made to rest upon the requirement of the property owners' consent but rather upon the constitutional limitation upon the police power. On page 1391 it is said:

> "The ancient and established maxims of Anglo-Saxon law, which protect these fundamental rights in the use, enjoyment and disposal of private property are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history,—the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with, to use it and dispose of it, not at the behest of a master but in the manner that becomes free men.
>
> "Laws are seldom wiser that the experience of mankind. These great maxims, which are but the reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private right.
>
> "The police power is founded in public necessity, and only public necessity can justify its exercise. The result of its operation is naturally, in most instances, the abridgment of private rights. Private rights are never to be sacrificed to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justly warrant the exercise of the power.

> The public health, the public safety and the public comfort are properly objects of this high importance; and private rights, under reasonable laws, must yield to their security.
>
> "Since the right of the citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare."

The whole of this opinion is an eloquent exposition of the true nature of the right of private property and a searching penetration of the ordinance under examination to discover its true purpose as against its fair pretenses. The second of the cases cited, *Fitzhugh vs. Jackson,* was decided by the Supreme Court of Mississippi in 1923. The first paragraph of the syllabus holds,

> "It is not within the police power of a municipality to enact an ordinance prohibiting the erection of a building for business purposes or the conducting of a business in a residential portion of the municipality."

The presiding Justice delivered the opinion of the Court. On page 285 of the opinion it is pointed out that "the ordinance makes no classification of businesses because of their nature or the necessary incidents of such business. It simply says no business can be conducted in the residential portions of the town, except under the circumstances therein named." This the Court holds to be an arbitrary interference with the individual use of private property by the owner thereof, not within the police power.

In the notes to the three cases cited, the history of the subject is traced from its beginnings. To the cases therein cited and digested, we desire to add the recent case of

Tighe vs. Osborne, Inspector of Buildings for Baltimore City, decided by the Court of Appeals of Maryland on the 10th day of December, 1925. The Maryland court had before it an ordinance of the City of Baltimore to regulate the use as distinguished from the construction of all buildings in Baltimore City, except those proposed to be used for residential purposes,—in other words, a comprehensive zoning ordinance. Primarily the case turns upon an attempted delegation of power to the Inspector of Buildings, but in the course of its examination, the Court feels called upon to comment upon the fundamental legislative authority itself and quotes with approval Section 112a of *Tiedeman on the Police Power,* as follows:

> "The legislature cannot prohibit a use of lands, which works no hurt or annoyance to the neighbors or adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so. The legislature can determine whether it will permit or prohibit the doing of a thing which is harmful to others, in the proper consideration of the public welfare; but it cannot prohibit as a nuisance an act which inflicts no injury upon the health of property of others. If the harmful or innocent character of the prohibited use of land furnishes the test for determining the constitutionality of the legislative prohibition, it is clearly a judicial question and is certainly not within the legislative discretion, whether the prohibited act or acts work an injury to others. If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the constitution and it is the duty of the courts to declare it to be unconstitutional."

See also:

Goldman vs. Crowther, Md. 128 Atl. 50;
Mayor etc. vs. Turk, Del. 129 Atl. 512;
State ex rel. vs. McKelvey, Mo. 256 S. W. 474;
Ignaciunas vs. Risley, N. J. 121 Atl. 783;
State ex rel. Lachman vs. Haughton, 134 Minn. 226;
State ex rel. Roerig vs. Minneapolis, 136 Minn. 479;
Blackman Health Resort vs. Atlanta, 151 Ga. 507;
State ex rel. Westminster Church vs. Edgcombe, 108 Neb. 859;
Byrne vs. Maryland Realty Co., 129 Md. 202;
People of State of Illinois vs. Friend, 261 Ill. 16.

The annotations to the case of *Windsor vs. Whitney, et al.,* 95 Conn. 357, 12 A. L. R. 669, covering the question of the validity of ordinances establishing building set-back lines, without provision for compensation, show the weight of the authority to be against the validity thereof.

The annotations to the case of *Westminster Presbyterian Church vs. Edgecombe,* 108 Nebr. 859, 27 A. L. R. 437, discuss the validity of ordinances limiting the area of a lot that may be covered by a building and indicate that the weight of authority is against the power to make such limitations not strictly required for fire protection, etc.

The *Ignaciunas vs. Risley* case, cited above, was in the Supreme Court of New Jersey. It involved a "comprehensive zoning" ordinance of the town of Risley and it was held that the town had no constitutional authority, under the police power, to deny a permit for the erection of a store building in a zoned district limited to residence use. The case went to the Court of Errors and Appeals, 125 Atl. 121, and that Court held it unnecessary to decide the constitutional question in that the powers of the town were

limited to police regulation of the sort "designated to promote public health, safety and general welfare" and the Court held that those powers had been exceeded and, therefore, the permit asked for by the plaintiff should have been granted. As to the claim that a store in a residence neighborhood "is in itself a menace to the public health and the safety" the Court of Errors and Appeals said, "Both common experience and common sense demonstrate the unsoundness of such an assertion." Further on this point the Court said:

> "On what theory can it be said that the restraining of the respondent from erecting a combined store and dwelling house upon his property will tend to promote the general welfare of the community? It is probable that its presence there, without regard to its use, would be objectionable to other property owners in the *immediate* neighborhood, who would prefer that business places should not be established in that part of the town. *But that is quite immaterial*, for such property owners have not acquired the right to impose upon owners of other property *in the vicinity* any restrictions upon the lawful use thereof. The ordinary use of property is not authorized by the general welfare clause of the statute to be prohibited because repugnant to the sentiments or desires of a particular class residing in the immediate neighborhood thereof, but only because such use is detrimental to the interests of the public at large. In other words, the restriction authorized by this provision of the statute upon the untrammeled use of property for the promotion of the general welfare of the community must be such as will tend in some degree to prevent harm to the public generally or to promote the common good of the whole people of such community. That the prohibition of such a building as is contemplated by him will not have any such effect seems to us to be manifest."

Since the decisions in the *Ignaciunas* cases, the subject has been before the Supreme Court of New Jersey in the following cases:

Losic vs. Bindra, 128 Atl. 619;
Sarg vs. Hooper, 128 Atl. 376;
Ingersoll vs. Village of South Orange, 128 Atl. 393;
Henry Becker & Son vs. Dowling, 128 Atl. 395;
Summit Porcelain Co. vs. Board, 128 Atl. 819;
Reimer vs. Dallas, 129 Atl. 390;
Plymouth vs. Bigelow, 129 Atl. 203;
Printz vs. Board of Adjustment, etc., 129 Atl. 123.

This series of cases has presented nearly all the different phases of zoning legislation and the opinions indicated have all pertained to general or "comprehensive zoning" ordinances and in each case the Court has held the refusal of permits unjustified because the particular restrictions preventing the plaintiff making use of his property as he desired were unreasonable and, therefore, invalid. In the case of *Printz vs. Board of Adjustment, etc.,* the last case referred to, the Court said:

> "* * * Which one of these two methods of approach should be used in this case is a question which goes to the root of our system of government; but without referring further to that, it is sufficient to say in our opinion we are not at liberty to examine the question from any other than a legal standpoint and therefore we cannot be controlled in our consideration of the validity of this ordinance by its possible benefit to the public, if in point of fact that benefit is purchased by appropriating the rights and property of individuals to the public use without just compensation and by the violation of the guarantees of the state and federal constitutions."

The ordinance before the Court, as in the case at bar, had a provision, which seems to be common to such or-

dinances as we have had occasion to look over, for a so-called Board of Appeals to whom applications could be made and it was authorized, in its discretion, to disregard the "strict letter" of the ordinance if "the spirit of the ordinance shall be preserved." As to this the Court says:

> "This sonorous but vague and cloudy formula is, to say the least of it, a poor and uncertain substitute for those guarantees of the state and federal constitutions which assure to every citizen the right to hold and enjoy the use of his property in any manner he pleases, so long as he does not thereby injuriously affect the health, security, or welfare of his neighbor or the public as the words 'health, security and welfare' have hitherto been understood in this state."

Further, as to the police power, the Court said:

> "For while the existence of the police power may be invoked to determine what rights are guaranteed by the constitution, it can never be invoked to justify an invasion of those rights once they are ascertained. And if in fact this ordinance does appropriate private property to a public use, or if it does deprive owners of their property without compensation, then such an invasion of private rights cannot be sustained under the police power unless the exercise of those rights menaces the public health, safety or morals."

In the case of *Spann vs. Dallas,* (Tex.), 19 A. L. R. above referred to, at page 1390 of the opinion the Court says:

> "*Constitutional powers can never transcend constitutional rights.* The police power is subject to the limitations imposed by the Constitution upon every power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizens, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to

be interpreted in the light of the maxims of Magna Charta and the common law as transmuted into the Bill of Rights, and those things which those maxims forbid cannot be regarded as within any grant of authority made by the people to their agents. Cooley, Const. Lim. 209. In our Constitution the liberties protected by the Bill of Rights are, by express provision, 'excepted out of the general powers of government.' It is declared that they 'shall forever remain inviolate,' and that 'all laws contrary thereto shall be void.' "

"To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty,—an expression of his freedom,—guaranteed as inviolate by every American Bill of Rights."

At page 1392, the opinion reads as follows:

"The ordinance is clearly not a regulation for the protection of the public health or the public safety. It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety. It is equally idle, in our opinion, to speak of its impairing the public comfort or as being injurious to the public welfare of a community. Retail stores are places of trade, it is true, but as ordinarily conducted they are not places of noise or confusion. This is particularly true of small stores, such as it appears the plaintiff contemplated erecting. The ordinary trading that goes on within them is reputable and honorable, and can hurt nobody. According to common experience it is done in an orderly manner. *It could disturb or impair the comfort of only highly sensitive persons.* But laws are not made to suit the acute sensibilities of such persons. It is with common humanity—the average

of the people—that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class. The ordinance visits upon ordinary retail stores, engaged in a useful business, conducted in an orderly manner, frequented and availed of by respectable people, and doubtless serving as a convenience to many, all the proscription visited upon common nuisances. In the face of common knowledge that they are ordinarily respectable and peaceable places for the conduct of perfectly lawful pursuits evolved out of recognized customs and habits of the people as old as American life, the ordinance deals with them as though they had all the offensive character of a nuisance. But their treatment, in effect, by the ordinance as a nuisance, does not make them so. It is a doctrine not to be tolerated in this country that either state or municipal authorities can, by their mere declaration, make a particular use of property a nuisance, which is not so, and subject it to the ban of absolute prohibition. *Yates v. Milwaukee,* 10 Wall. 297, 19 L. ed. 984."

"Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

In the case of *Goldman vs. Crowther,* (Md.) 128 Atl. 50, there was also involved a comprehensive zoning ordinance. The plaintiff was prevented thereby from using the basement of a dwelling for a tailor shop and he sought relief. A building permit was not involved because the use proposed did not require any remodeling of the building. The discussion centered on the constitutionality of the ordinance itself, the Court saying:

"There is nothing in the record from which it can be inferred that such use is offensive to the eye, the ear or the nose of a person of ordinary sensibilities."

Further the Court said:

"The question can be approached by either of two avenues: One, legal, the other, political and sociological. If approached by the former, the validity of the restraints and prohibitions of the ordinance depend upon whether they violate certain definite guarantees and assurances found in the federal and state constitutions and the law of the land. If approached by the latter, the question is to an extent freed from the embarrassments of harmonizing any apparently repugnant provisions of the act with those guarantees, since in such case the end to be accomplished and the benefits to be derived are the main factors to be considered, and the rights of mere individuals may be subordinated to the public convenience upon the principle that such rights are always subject to the paramount authority of the state to subordinate them to what is conceived by those speaking for it to be for the benefit of the state as representing all citizens.

"It may well be that the proposed construction may increase the fire hazard, and therefore involves the public safety, but that would be a proper subject for regulation by the building code or perhaps the zoning ordinance in prohibiting the erection of a building of such character, that is, by attaching an addition to be used for stores to a frame dwelling house. But this is not the prohibition of the building code or the zoning ordinance. The latter absolutely and unqualifiedly prohibits any and all buildings to be used for business purposes in the zone which includes prosecutors' property. We think in that respect the ordinance is unreasonable, and therefore unenforcible, and presents no basis for the refusal of the permit to the prosecutor. *This feature of these ordinances has so frequently been passed upon by the court as not to require citation of authority other than that of Ignaciunas v. Nutley,* 125 Atl. 121."

In the case of *Passaic v. Patterson Bill Posting Company,* 72 N. J. Law. 285, an ordinance to regulate the

erection of bill boards was before the court. It was held in the lower court that because the erection of such might be attended by danger in case of windstorm, etc., the ordinance could be sustained. The Court points out that the same danger exists in the case of buildings, fences, etc., and at page 287 says:

> "In determining whether a regulation is reasonably necessary to secure the public safety and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like bill boards should be set back from the line. * * *
>
> "If the presence of a store in a residence district of the city is a hurtful thing, so much so as to warrant its proscription by law, certainly it is not rendered less harmful by the fact that three fourths of the property owners of the immediate area,—many of whom may not reside there at all,—consent to its presence. Yet this ordinance, while treating the presence of a store as so injurious to the public as to justify the extreme penalty of its absolute prohibition, recognizes that if a certain number of property owners of the district approve of its presence, all of its injurious properties will disappear.
>
> "This feature of the ordinance, in our opinion, reveals its true purpose. It reveals with reasonable clearness that its object is not to protect the public health, safety, or welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the city."

The case of *Mayor, etc., vs. Turk,* (Del.) 129 Atl. 512, decided May 27, 1925, reviews most of the cases reported up to that time on the subject and clearly meets all the contentions in support of the validity of such legislation, concluding as follows:

"It still leaves untouched the primary question with which we are here concerned, viz., whether the right of private property can be taken away when the circumstances of its use are inoffensive and of injury to no one. I am unable to find in the mere comprehensiveness of a zoning ordinance any circumstances which render those things permissible which, if done on a smalier scale, or in the case of a partial zoning would not be permissible."

The Court points out that in the case of a partial zoning of a municipality, it would have to be assumed that the council in its discretion left the rest of the city in effect zoned for general purposes.

In the case of *Fitzhugh vs. Jackson,* 132 Miss. 585, above cited, the Court says:

"The fundamental rights of the people are inherent and have not been yielded to government control. They are not subjects of governmental authority, they are the subject of individual authority. Constitutional powers can never transcend constitutional rights."

CASES IN THE SUPREME COURT OF OHIO.

In Ohio the subject of zoning has been a matter of debate. There are conflicting decisions in the lower courts, but since the decision by the District Court in this case, the two cases hereinbefore cited have been decided by the Supreme Court of Ohio and must now be considered more fully. They are the *City of Youngstown et al. vs. Kahn Brothers Building Company,* 113 O. S. 17, 148 N. E. 842, and *Pritz vs. Messer, et al.,* 113 O. S. 89, 149 N. E. 30.

The *Kahn* case involved an ordinance establishing only a fraction of the terrtiory of the City of Youngstown into a district and providing that no building intended to be used as a dwelling should be erected in said district except as a single or two-family dwelling. The obvious object of the ordinance was to prohibit the erection of apartment houses in the district in question.

In the *Kahn* case the Supreme Court held the Youngstown ordinance unconstitutional as a taking of property without due process of law, and a taking of private property for public use without compensation. The decision is expressly based upon the holding that an apartment house in a healthful part of a municipality does not impair or endanger the public health, morals and safety of the district and of the municipality.

In the opinion, page 20, the principles governing the use and extent of the police power in such cases are clearly stated and they are not enlarged beyond the customary and traditional view of the power. On page 23 it is said:

> "A positive prohibition is imposed by the ordinance upon the erection of an apartment house upon residence territory within the district. Thus the owner is substantially deprived of the use of his property * * *. The police power, however, is based upon public necessity. There must be an essential public need

> for the exercise of the power in order to justify its use * * *. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. * * * Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be a continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are, therefore, remitted to the proposition that the police power is based upon public necessity and that the public health, morals or safety, and not merely aesthetic interest must be in danger in order to justify its use."

The opinion then proceeds to discuss the nature of an apartment house and its effect upon the lives of those who occupy them, and on page 25 it is said:

> "We see less reason for excluding an apartment house from a strictly residence district than for excluding a store or other business of a non-nuisance character from a strictly residence district. Ordinances prohibiting the establishment of a non-nuisance business within a residence district have frequently been held unconstitutional upon the ground that they constitute a taking of private property without compensation."

Finally the Court holds the ordinance is invalid and enjoins its enforcement.

In the *Pritz* case the City of Cincinnati had enacted a comprehensive zoning ordinance. Messer had taken out a permit prior to the passage of the ordinance and the ordinance itself expressly exempted from its prohibitions improvements for which permits had thus already been

issued. Pritz owning adjoining property, sought to enjoin the erection of an apartment house by Messer under his permit because of the prohibitions contained in the ordinance. The Supreme Court followed the Court of Appeals in its finding of fact and the judgment in the case affirmed the Court of Appeals in the following language:

> "The Court of Appeals, having found as a fact that a valid building permit was issued before the passage of its ordinance and the zoning ordinance itself containing a specific exemption within which this case falls, the constitutionality of the ordinance does not entitle the plaintiff in error to relief and the judgment of the Court of Appeals must be affirmed."

Obviously, as the Cincinnati ordinance in terms exempted the Messer permit, no discussion of the constitutionality of the Cincinnati ordinance was necessary. Nevertheless, the Court does discuss it and draws a distinction between a so-called comprehensive zoning ordinance and a district ordinance, setting forth that while municipalities have not the power to set up restricted districts, a different situation exists where an ordinance deals comprehensively with the whole territory of the municipality. This, however, is made to proceed upon the assumption that there is "*proper* exercise of the police power" and that "the laws and regulations are reasonably necessary for the preservation of the public health, safety and morals."

To the extent that there is conflict between the doctrines announced in these two cases, that in the *Kahn* case must be regarded as decisive, since the constitutional question was there squarely presented and decided, while in the *Pritz* case its decision was not necessary to the result and the discussion of it is *obiter*. Nevertheless, in the *Pritz* case, there is a restatement of the principles

announced in the *Kahn* case and again no enlargement of them. The constitutional question which is discussed in the opinion is rather a general discussion of the police power, without any particular facts in view or any claimed impairment of property rights which can be used to measure the reasonableness of particular regulations.

With great respect to the Supreme Court of Ohio, it is difficult to see a substantial distinction between the district regulations and comprehensive regulations so far as the rightfulness of the taking of property without compensation is concerned. Perhaps it is enough to say with regard to the *Pritz* case that since the court found Messer's permit valid and there was thus no question of the taking of anybody's property or the limiting of any use of the property in the case, there was no real necessity for the court to consider whether any feature of the Cincinnati ordinance was valid. Nothing in the decision in the *Pritz* case prevents a Cincinnati property owner in a proper case from raising the constitutionality of that ordinance as it may apply to his property, if a case arises in which his rights are impaired under the doctrine of the *Kahn* case.

So far as the Ohio cases are concerned, therefore, the *Kahn* case establishes the principles that were laid down in this case by the District Court, as the law of the State of Ohio, and we proceed to point out briefly some of the violations of these principles to be found in the ordinance here in issue.

APPLICATION OF THE LAW TO THE FACTS.

From all the foregoing, we believe the law to be correctly stated in 19 *R. C. L.*, pp. 805-806, as follows:

> "A municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, the court before which it is brought must be able to say that it will tend to promote the public health, morals, safety or welfare; that the means adopted are adapted to that end and that it is impartial in operation and not unduly oppressive upon individuals."

In the light of that statement, we proceed to a brief examination of the ordinance in general, with the full understanding that we have nothing to do with the motives of the Council of the Village of Euclid, but have a great deal to do with the purpose of the ordinance which they enacted. We understand too that so far as this case is concerned, the appellee has no right to relief merely because there are exclusive, irrational or improper provisions scattered here and there through the ordinance. The appellee's rights depend upon the operation of this ordinance upon its property. If an inspection of this ordinance shows that it is not addressed in general to the proper objects of the police power but is drawn on the erroneous assumption that the village has the power to regulate the use of private property in the interest of entirely fanciful or fantastic social or aesthetic grounds, then the particular restrictions applying to the appellee's property get their color and purpose from the general purpose of the enactment, and since the main purpose thus established for the ordinance as a whole is inadmissible, the appellee cannot be required to make the enor
contribution out of its property to its accom
which these restrictions entail.

The references in the following are to the ordinance as printed in the transcript of the record.

The ordinance undertakes arbitrarily and finally to determine that a certain amount of the territory of the village, less than the whole, is deemed and found to be sufficient for all industrial and commercial uses. (Rec. p. 13)

The ordinance is declared to be in fulfillment of a desire of the citizens of the village to "preserve the present character of said village" and to provide "for the general welfare of the citizens thereof," which may or may not be for the general welfare, as that term is properly used; that is to say, the general welfare which is the basis of the police power does not necessarily mean the particular local and private welfare of the people, or of some of the people, resident within the accidental political limits of this village. The general welfare which recognizes the Village of Euclid as merely a constituent element of our general society and expects it to share the burdens, as it enjoys the benefits common to that society, is the general welfare upon which the police power rests. (Rec. p. 13.)

The ordinance defines a single family dwelling and requires it to consist of a basement containing not less than 400 square feet, and not less than three rooms, and a bathroom. No part of any of the areas on the map opposite page 26, designated as U 1, can be used by owners for any other purpose than the construction of single family dwellings thus defined, and no such building may be erected in this territory on a lot having an average width of less than 40 feet (Rec. p. 21), and having a minimum area of less than 5000 feet. (Rec. p. 20)

No matter what the size of the lot in U 1 territory, nor however adequately built from the point of view of

sanitation, strength and safety, there may not be built in it a two-family dwelling, a double house or an apartment house, a church, a school, a public library, a bank or art museum (Rec. p. 16). If anybody owning land in a U 1 district builds a house on it and resides there, he may not conduct any business thereon except that a physician, surgeon, dentist or musician may have his office at his home and any person may carry on a customary home occupation provided that he employs no one to assist him therein and does not display, even by a small sign in his window, an announcement of the fact that such occupation is carried on there. Even the helpful occupation of renting rooms and table board, by which so many otherwise desolate people are admitted into the friendly atmosphere of family association as a substitute for hotels and restaurants, may not be conducted in U 1 territory, if so much as a sign of rooms and board is placed in the window. (Rec. p. 18)

Similar limitations are imposed upon territory designated as U 2 in the ordinance. Upon this only one or two-family residences may be erected. Apartment houses are excluded, churches, schoolhouses, libraries and banks are all prohibited, although by every canon of judgment these uses are harmless and contribute to the well-being of persons who live near them. In U 3 territory apartment houses for the first time are permitted, but they are grouped with hotels, churches, hospitals or sanitariums and public office buildings, all of which are excluded from the ampler environments of U 1 and U 2, so that instead of avoiding congestion, in accordance with one of the professed purposes of the ordinance, the most congesting uses are grouped together and restricted to very limited territory.

As we have already pointed out, the uses from Class U 1 to Class U 6 are cumulative. Each succeeding class

includes all of the permitted structures in the classes preceding it, in addition to those specifically enumerated for the class in question. That is to say, Class U 2 is Class U 1 plus two-family residences; Class U 3 is Class U 1 and Class U 2 plus apartment houses, hotels, churches, hospitals, etc. By this process in Class U 6 territory it is permitted to build industrial undertakings, sewage disposal plants, penal and correctional institutions, warehouses, banks, theaters, hotels, churches, schools, libraries, apartment houses, two-family residences and single family residences. If there were any genuine purpose in this ordinance to segregate family life from an industrial and commercial environment, no such situation would be tolerated. From that point of view, it is just as objectionable to allow a man to build his house next to a church as it is to allow the church to be built next to a residence.

The lot area restrictions set forth on pages 20 and 21 show a similar departure from any genuine public purpose. The lots on which the fewest people live are required to have the largest free area for light and air while those in which the most people live have minimum requirements for ventilation and light. The same theory runs through the set-back lines shown on pages 23 and 24 of the ordinance.

An inspection of the map shows graphically just what the real purpose of the ordinance is. The territory south of Euclid Avenue, which is wooded hillside, and the territory north of Lake Shore Boulevard, which is Lake Shore property, are obviously the most healthful and desirable residence portions of the village, yet from both of these all are excluded except those who are able to maintain the more costly establishments of single family residences. Except where the existing uses have already dictated otherwise, these two great sections of the village

are all Class U 1 territory. No apartment house or two-family house can be erected in either, and yet the men, women and children who, for reasons of convenience or necessity, live in apartment houses or in the more restricted surroundings of two-family residences are of all others most in need of the refreshing access to the lake or the better air of the wooded upland. By the obvious necessities of the case the territory between the two railroads will be industrially developed. All the people who live in the village and are not able to maintain single family residences of the size and lot area herein prescribed, are pressed down into the low-lying land adjacent to the industrial area, congested there in two-family residences and apartments, and denied the privilege of escaping for relief to the ridge or lake.

As to the property of the appellee, which the record indisputably shows, and the District Court found, to be especially suited for industrial and business uses, and which is in all points like other property, devoted to business uses, only a short distance west of it in the City of Cleveland, three kinds of use are permitted. Adjacent to Euclid Avenue itself, only two family residences, back of that for a short distance, apartment houses, and then stretching away to the Nickel Plate Railroad, industrial undertakings. But an industry seeking to use the appellee's land would not be permitted to set up office buildings or show rooms on the Euclid Avenue frontage, as is at present done practically throughout its entire length of ten miles from the Public Square in the City of Cleveland to the village limits of Euclid, nor could a drug store or insurance office, a church or public school or a public library be located there, nor could a private lane be constructed from Euclid Avenue as a means of access to a factory located in the southerly portion of this acreage.

All of these restrictions are, by this ordinance, sought to be made stronger than the mere legislative will which enacts them. It is, of course, the law that a legislature may not pass an irrepealable ordinance or impose limits upon its own legislative power, *State vs. Graves,* 19 Md. 351, but the Council of the Village of Euclid has specified that it and its successors may not amend this ordinance except by a three-fourths vote (Rec. p. 25), unless the proposed amendment shall have first received the approval of the City Planning Commission, which, of course, can have no part of the legislative discretion delegated to it, and if an amendment, duly presented and approved by the City Planning Commission, is protested against by the owners of 20% of the land within the area proposed to be altered, the Council may pass the ordinance only by a three-fourths vote. If the owners of 50% of the land in any area present a petition requesting an amendment to the regulation, the Council must vote within ninety days of the filing of the petition, but there is no relaxation upon the requirement that the proposed amendment will be inhibited except by a three-fourths vote unless the City Planning and Zoning Commission concur or if 20% of the land owners protest.

The enforcement of this ordinance is entrusted to the Board of Zoning Appeals and the Inspector of Buildings. From a decision of the Inspector of Buildings an appeal may be made to the Board of Zoning Appeals and where there are "practical difficulties" or what the Board of Zoning Appeals, in its unlimited discretion, may regard as "unnecessary hardships" in the way of carrying out the strict letter of the provisions of the ordinance, the Board of Zoning Appeals is given the power to interpret any such provision in general harmony with what it assumes to be "the general purpose and intent of this ordi-

nance," so that the public health, safety and general welfare, as those objects appear to the Board of Zoning Appeals, may be secured, and what the Board of Zoning Appeals regards as substantial justice done (Rec. p. 24).

In short, there is scarcely any attempted abuse of the police power which the courts have stricken down which is not attempted afresh in this ordinance.

The prospective purchaser of land from the appellee would, of course, look at the zone map and realize that any attempt by him to use land, if he were to purchase it from the appellee, would be either subject to these burdensome restrictions or freed from them only at the end of expensive litigation. If such a purchaser felt that the use for which he desired to purchase appellee's land was safe from any of the restrictions now imposed, he would yet realize that he was buying land in a municipality which claimed and exercised the right to dictate, at its uncontrolled will, just what uses he might make of the land and that the next act of the Council which enacted this ordinance might make his purchase valueless for uses permitted at the time of the purchase, for the police power is a continuing power and, as this ordinance shows, a power which grows by what it feeds on.

The effect of this ordinance upon the appellee's property is amply shown by the record. Prospective purchasers have been warned off, the value of the appellee's land depreciated and the value thus taken from the appellee cannot be restored unless there be an authoritative pronouncement in its favor, stating limitations upon the right of the village Council to prohibit innocent and appropriate uses of its property.

The existence of Ordinance No. 2812 and the implications of power claimed by its enactment are the cause of the wrong and damage to the appellee.

ZONING.

In the foregoing we have disclaimed any desire to discuss the so-called philosophy of zoning. It is easy to be entrapped by a term and to fall into the logical fallacy of the ambiguous middle. Many so-called zoning laws are either limited to or contain provisions within the field of the police power, and we freely admit that as human progress develops, new conditions may arise and new discoveries be made that will cause new conceptions of social needs and bring within the legislative power fields previously not occupied, but we frankly do not believe that there has been any such development of new conditions as necessitates or justifies the communal control of private property attempted by this ordinance, or by many others, some of which have been sustained by state courts. Many of the benefits claimed by counsel for the Village of Euclid to flow from "zoning" are, in fact, the familiar consequences of processes of recognized validity. Building regulation, city planning and the concerted voluntary action of proprietors have accomplished and can accomplish all the protection which the safety, health and morals of a community require and many objects of an aesthetic kind as mere incidents. But the zoning power for which counsel contends is a power different in kind and is in effect a political and communal control of the uses to which an owner may devote his property. It is not the power merely to negative dangerous or anti-social uses, but the power affirmatively to select among admittedly harmless uses those which the political power deems the most popular and to prohibit all others. We do not believe this power exists. Nor are we at all sure that if there were such communal control recognized by the Constitution, its fruits would justify it. The theory of our liberty has always been to maintain the right of the individual

to his liberty and to his property and to allow free play to economic laws, private contract and personal choice. Concessions of personal liberty we are called upon to make, but we make them only when there is a rigid demonstration that the higher public good will be served. This is not only our legal theory, but it is a policy which has been abundantly justified by its results. The virility and initiative of our people has been preserved because we have not turned over to the state the duty of regimenting us, classifying us and directing the small details of our lives.

To assume that the Council of the Village of Euclid, or any other village is able to measure, prophetically, the surging and receding tides by which business evolves and grows, to foresee and map exactly the appropriate uses to which land shall be developed and the amount necessary for each separate use, in a complicated classification, is to assume a degree of wisdom which not only does not exist in municipal councils but does not exist anywhere. With the utmost freedom to impose restrictions by private contract, only small areas have been brought under such restrictions, and those for the most part temporary in character. Restraints and restrictions upon alienation and use, even when imposed by covenant, are looked upon with disfavor and construed strictly in the interest of the free transfer and use of property.

7 *R. C. L.* 1115 citing *Hutchinson vs. Ulrich*, 145 Ill. 336;

Hitz vs. Flower et al., 104 O. S. 47, 57.

Yet the theory of zoning, in its ampler definitions, assumes that the municipal councils will be able to do, comprehensively, what private owners, most interested, have found it difficult to do, even on a small scale. Thus to sub-

divide a municipality, to classify it and crystallize restrictions into laws, is to embed a fly in amber. The forces of movement are stayed and growth is arrested. Around such an ordinance there come to be interests which feel themselves vested and changes in the ordinance, to respond to new needs, have to be made against the protest of those who have come to rely upon arbitrary artificial restrictions rather than to feel themselves subject to the operation of general economic and social laws, which they can measurably foresee and discount.

That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose.

Respectfully submitted,

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